Supreme Court, U.S.
FILED

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No. 01-

IN THE

# Supreme Court of the United States

NICHOLAS F. COPERTINO,

*Petitioner,*

*v.*

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Michael W. Moore, STATE OF FLORIDA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Is there a point at which a prosecutor's closing argument — calling a Defendant "Young Mr. Hitler" — constitutes prejudice per se, requiring reversal?

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Petitioner, Nicholas F. Copertino, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is not reported. It is reproduced in the Appendix at App. 1a. The Opinion of the United States District Court is not reported. It is reproduced in the Appendix at App. 14a.

## STATEMENT OF JURISDICTION

The Judgment of the Eleventh Circuit Court of Appeals was entered on December 12, 2001. On February 4, 2002, the Eleventh Circuit Court of Appeals denied a timely Petition for Rehearing and Rehearing En Banc. On April 8, 2002, United States Supreme Court Justice Kennedy extended the time for filing this Petition for Certiorari to and including June 14, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment (Due Process Clause)

> Section 1. . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

## STATEMENT OF THE CASE

### A. Proceedings Below

Petitioner was convicted of multiple counts of manslaughter and culpable negligence in a Florida state court, stemming from a motor vehicle accident. The Florida Fourth District Court of Appeal affirmed Petitioner's convictions (App. 79a), and the Florida Supreme Court denied review. App. 101a. The United States District Court for the Southern District of Florida granted Petitioner's Amended Federal Habeas Corpus Petition, filed pursuant to 28 U.S.C. § 2254, and vacated Petitioner's convictions. App. 14a. The United States Circuit Court of Appeals, for the Eleventh Circuit, reversed the District Court's grant of habeas corpus relief and reinstated Petitioner's convictions. App. 1a. The District Court granted Petitioner release pending this Application for Certiorari (App. 96a), but the Eleventh Circuit reversed that Order. App. 88a.

### B. Factual Background

Petitioner was driving a motor vehicle at a high rate of speed, with eight other occupants, on a main thoroughfare in Boca Raton, Florida. While driving, Petitioner's vehicle spun out of control, striking another vehicle. Five passengers in Petitioner's car died and two were severely injured. Petitioner was not under the influence of drugs or alcohol at the time of the accident. Petitioner's explanation was that an object from the road had pinched his right rear brake line causing his vehicle to spin out of control. This theory was supported by witnesses to the accident and expert testimony.

The State presented evidence regarding Petitioner's speed (approximately 90 m.p.h.), the number of persons in the vehicle, the manner in which Petitioner was driving, and the inexperience of Petitioner as a licensed driver, in order to demonstrate that Petitioner had engaged in a reckless disregard for human life or the safety of others. The Petitioner was convicted.

The Eleventh Circuit Court of Appeals described the accident and the prosecutorial misconduct this way:

> What happened on February 23, 1996, was a terrible and tragic accident, in no way mitigated by the despicable acts of the prosecution in this case.

App. 7a. The district court wrote that the prosecutorial misconduct in this case was: ". . . unethical, reprehensible, contemptible and sanctionable". App. 98a.

During the State's rebuttal closing argument, the State compared Petitioner to Adolf Hitler ("the Hitler comment"):

> . . . [W]ell, first of all, we are going to blame the victims. We are going to blame the children, the children. They didn't ask young Mr. Hitler's over here permission — . . .

Regarding the Hitler comment, the Eleventh Circuit noted, "There is no indication that the comment was unintentional. Its probable purpose was to connect the Defendant driver with a despised, historical figure responsible for the slaughter of millions." App. 7a.

Despite the trial court's admonition, during closing argument, the State approached the jury, laid grizzly autopsy photographs on the jury rail, and invited the jurors to meet "the children," "those little girls," and the "innocent child" by name. The Eleventh Circuit commented, "The prosecution's use of the autopsy photographs during rebuttal closing argument was improper. . . . [T]he prosecution used the photographs not to prove identity or the cause of death, but merely as a rhetorical flourish." App. 9a.

The question presented is whether some prosecutorial misconduct so exceeds the bounds of fairness that a new trial is always required. Certification is sought because of the substantial due process implications of the decision below.

## REASONS FOR GRANTING THE WRIT

### I. Conflict between the Eleventh Circuit and Sixth Circuit on the due process clause implications concerning prosecutorial misconduct warrants certiorari review by this Court.

The United States Court of Appeals for the Eleventh Circuit has held that comparing Petitioner to Adolf Hitler does not violate an accused's rights under the Due Process clause and is subject to a harmless error analysis. That decision conflicts with the following Circuit Court of Appeal decisions:

In *Martin v. Parker*, 11 F.3d 613 (6th Cir. 1993), the prosecution's closing argument compared Martin to Adolf Hitler. After rejecting a harmless error analysis, the Sixth Circuit granted Martin's writ of habeas corpus, pursuant

to 28 U.S.C. § 2254(b), on the grounds of prosecutorial misconduct. The Court wrote:

> This Court grants habeas corpus relief for prosecutorial improprieties where the prosecutor's statements are so egregious as to render the entire trial "fundamentally unfair". *Id.* at 616, citing *Angel v. Overberg*, 682 F.2d 605, 608 (6th Cir. 1982).
>
> Here, we find especially deplorable the prosecutor's attempts to suggest to the jury through cross-examination and final argument a similarity between Martin and Adolf Hitler. *Id.* at 616.

In *United States v. Steinkoetter*, 633 F.2d 719 (6th Cir. 1980), the Sixth Circuit found reversible error when the prosecutor, in closing argument, compared the defendant with Pontius Pilate and Judas Iscariat. The Court wrote: "The references . . . to Pontius Pilate and Judas Iscariat convey strong prejudicial overtones and have no place in a case being presented by a direct representative of the United States Department of Justice. . . ." *Id.* at 720. "In pursuance of the standards set by the United States Supreme Court in *Berger v. United States* (citation omitted), this Court reiterates that it will enforce the ban on 'foul blows', even where to do so requires still another trial of the same case." *Id.* at 720.

This Court should grant review to resolve the conflicts between the Eleventh and Sixth Circuits. Resolution of these conflicts will establish a constitutional restraint on gross prosecutorial misconduct, or at the least, establish that "Hitler" has no place in contemporary criminal trials.

## II. The decision below presents an important but unanswered question regarding the guaranties of the due process clause as it applies to prosecutorial misconduct.

In *Berger v. United States*, 295 U.S. 78, 79 L. Ed. 1314, 55 S. Ct. 629 (1935), this Court addressed misconduct by a Federal prosecutor with language that is equally applicable to a State prosecutor:

> The United States Attorney is a representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as his obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

*Id.* 295 U.S. at 88.

The important but unanswered question is whether the kind of egregious prosecutorial misconduct inherent in this case renders the entire trial fundamentally unfair, requiring reversal, or whether the appellate court should apply a harmless error analysis.

American Bar Association Standard for Criminal Justice 3-5.8 (3d Ed. 1993) provides:

> (a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

Certiorari should be granted to resolve whether prosecutorial misconduct has a constitutional limit; a limit which if transgressed, constitutes prejudice per se, requiring reversal. Calling a Defendant "Young Mr. Hitler" crosses the line which this Court should draw.

## CONCLUSION

For the foregoing reasons, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A — UNPUBLISHED OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED DECEMBER 12, 2001**

**UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 01-10226

D.C. Docket No. 00-08233-CV-KLR

NICHOLAS F. COPERTINO,

Plaintiff-Appellee,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Michael W. Moore, STATE OF FLORIDA,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

(December 12, 2001)

Before HULL, MARCUS and FARRIS*, Circuit Judges.

---

* The Honorable Jerome Farris, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

*Appendix A*

FARRIS, Circuit Judge:

Respondents appeal a grant of a writ of habeas corpus to Nicholas Copertino, who was convicted on multiple counts of 1) manslaughter by culpable negligence and 2) culpable negligence. The district court found that the state adjudication had resulted in a decision contrary to federal law and to the facts in light of the evidence. We reverse.

## I.

On February 23, 1996, at approximately 9:45 p.m., Nicholas Copertino lost control of his Honda Civic, in which he, a friend, and seven backseat passengers rode. The car spun across a concrete median and was struck by a car driving in the opposite direction. Six of the backseat passengers were ejected through the back window. Five of them died at the scene, and the sixth became a quadriplegic.

Copertino, nineteen years old at the time of the accident, was convicted on five counts of manslaughter by culpable negligence and six counts of culpable negligence. At trial, the State contended that he drove recklessly and far beyond the speed limit. Copertino asserted that he lost control of the car when it hit an object that pinched the brake line.

Copertino contends that three instances of prosecutorial misconduct violated his right to due process under the Constitution. The first instance occurred when the prosecutor asked Copertino to stand for identification by the car's front-seat passenger, Copertino's close friend. Copertino stood, put his arms out, and smiled, which the trial court

interpreted as a reaction to the witness calling Copertino's "suit" a "uniform." The prosecutor said "Is this a joke, sir?" Defense counsel moved for sanctions, which were denied. The trial court directed the prosecutor to "move on." After the witness stepped down, there was a sidebar discussion where defense counsel again moved for sanctions and a mistrial. Those motions were denied.

During the State's rebuttal closing argument, the prosecutor referred to Copertino as "young Mr. Hitler." Defense counsel moved for a mistrial, which the court denied, though it ordered the prosecutor to apologize. The prosecutor did so reluctantly, stating "I have been asked to apologize, ladies and gentlemen, and I will for the comment that I made but it —." The trial court interrupted her, saying "you will disregard the last comment before the apology of the prosecutor."

During the State's rebuttal closing argument, the prosecutor presented the jury with autopsy photographs of several of the deceased teenagers by way of "introducing" them. The court had admitted the autopsy photographs over defense counsel's objections.

The Florida District Court of Appeal upheld Copertino's conviction. On habeas review, the federal district court reversed it. This appeal followed.

*Appendix A*

**II.**

Our mandate for habeas review is well-defined:

> [A writ of habeas corpus] shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C.A. § 2254(d) (West 2001); *see Wright v. Hopper*, 169 F.3d 695, 701 (11th Cir. 1999) ("We review the district court's grant or denial of habeas corpus relief *de novo*.").

Copertino presented his due process argument to the state appellate court as the third of three legal arguments. At the end of an opinion focusing primarily on the other arguments, the court discussed the impropriety of the "young Mr. Hitler" comment and the autopsy photographs, but found the acts to have been harmless because "[t]he state's evidence in this case [was] so compelling that the jury returned the only verdict possible." *Copertino v. State*, 726 So. 2d 330, 334 (Fla. Dist. Ct. App. 1999). It did not couch its analysis in due process terms, but noted that the errors had not been prejudicial.

Where, as here, the state court has not fully articulated how it has applied federal law, our level of deference to the state court's adjudication is unchanged: we will uphold the decision unless the result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable application of the facts in light of the evidence. *See Sellan v. Kuhlman*, 261 F.3d 303, 312-13 (2d Cir. 2001) (holding that federal habeas court must apply standard set forth under 28 U.S.C. § 2254(d) to state court decisions based on merits "even if the state court does not explicitly refer to either the federal claim or to relevant federal case law"); *Bell v. Jarvis*, 236 F.3d 149, 158-64 (4th Cir. 2000) (en banc) (holding that federal habeas court applies standard set forth under 28 U.S.C. § 2254(d) to state summary decisions even "when the state court fails to articulate the rationale behind its ruling," thereby overruling *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998), which had applied de novo standard of review); *Aycox v. Lytle*, 196 F.3d 1174, 1178 (10th Cir. 1999) ("[W]e must uphold the state court's summary decision unless our independent review of the record and pertinent federal law persuades us that its result contravenes or unreasonably applies clearly established federal law, or is based on an unreasonable determination of the facts in light of the evidence presented."); *Schaff v. Snyder*, 190 F.3d 513, 523 (7th Cir. 1999) ("If the [state court] determination was reasonable, that is, 'at least minimally consistent with the facts and circumstances of the case,' we shall uphold the state court ruling, even if it is not well reasoned or fully reasoned. . . .") (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1999)). This standard of review is consonant with the language of 28 U.S.C. § 2254(d), which focuses on whether the "decision," i.e., its resolution, was legally or factually unreasonable. *See Santellan v. Cockrell*, 271 F.3d 190, 193

(5th Cir. 2001) ("The statute compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning.")

Here the relevant question is whether the prosecutor's conduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). The unfairness must be "so egregious as to create a reasonable probability that the outcome was changed." *Davis v. Zant*, 36 F.3d 1538, 1545 (11th Cir. 1994) (quoting *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (en banc), *vacated on other grounds*, 478 U.S. 1016 (1986), *reinstated* 809 F.2d 700 (11th Cir.) (en banc)). "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome. Thus, the defendant must show a reasonable probability that, but for the prosecutor's statements, the result of the proceeding would have been different."[1] *Id.* (citations omitted).

---

1. This standard is nearly identical to the one applied to determine prosecutorial misconduct: (1) the remarks must be improper; and (2) the remarks must prejudicially affect the substantial rights of the defendant. See *United States v. Gonzalez*, 122 F.3d 1383, 1389 (11th Cir. 1997) (quoting *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir. 1991). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome would be different." *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995).

The state appellate court noted that "the defendant ha[d] the burden to show prejudicial error." *Copertino*, 726 So. 2d at 334. While it cited state statutory law, it, therefore, applied a standard similar to the one we must use in determining whether Copertino's right to due process was violated.

*Appendix A*

**III**

What happened on February 23, 1996, was a terrible and tragic accident in no way mitigated by the despicable acts of the prosecution in this case. Despite the State's arguments to the contrary, the record shows that defense counsel strenuously objected to the "Is this a joke, sir" comment, thereby preserving the issue for appeal.[2] The comment was an improper remark about the defendant's off-the-stand demeanor. *See, e.g., United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) ("It is also clear that the defendant's behavior off the witness stand . . . was not evidence subject to comment.").

The "young Mr. Hitler" comment offends any person who is even slightly familiar with the duty of a prosecutor in a criminal case to serve as the government's zealous, but fair, representative. *See United States v. Wilson*, 149 F.3d 1298, 1303-04 (11th Cir. 1998) (holding that trial courts should consider sanctioning prosecutors individually for misconduct even when conduct does not result in reversible error). There is no indication that the comment was unintentional. Its probable purpose was to connect the defendant driver with a despised, historical figure responsible for the slaughter of millions.

---

2. It strains credibility for the State to argue otherwise in light of defense counsel moving for sanctions twice and moving for a mistrial. See *U.S. v. Hoffer*, 129 F.3d 1196, 1202 (11th Cir. 1997) ("To preserve an issue for appeal, an objection must be sufficiently detailed to allow the trial court an opportunity to correct any arguable errors before an appeal is taken."). The trial court noted, "Anyway, there was a body gesture; there was a motion: there was an exchange . . . I sustained the objection that counsel had at the time and we moved on."

*Appendix A*

We looked to the record to see precisely what happened at the time the comment was made:

> [PROSECUTOR]: . . . Well, first of all, we are going to blame the victims. We are going to blame the children, the children. They didn't ask young Mr. Hitler's over here permission —
>
> DEFENSE ATTORNEY]: Objection, Your Honor, I may have a motion to make.
>
> [PROSECUTOR]: — to get in the car.
>
> THE COURT: You may approach. (The following proceedings were held at the bench:)
>
> THE COURT: Did I hear you say, young Mr. Hitler?
>
> I want you to apologize, Ms. Roberts.
>
> [PROSECUTOR]: I will apologize.
>
> THE COURT: You have a motion? I'll sustain your objection. You have a motion?
>
> [DEFENSE ATTORNEY]: Mistrial.
>
> THE COURT: Denied.
>
> [PROSECUTOR]: I apologize.
>
> [DEFENSE ATTORNEY]: Unbelievable.

(Whereupon, the proceedings returned to open court.)

[PROSECUTOR]: I have been asked to apologize, ladies and gentlemen, and I will for the comment that I made but it —

THE COURT: Ladies and gentlemen, you will please, I am instructing you, you will disregard the last comment before the apology of the prosecutor. Please continue.

The jury was made aware of the court's position and the offensive nature of the comment. *See United States v. Gainey*, 111 F.3d 834, 836 (11th Cir. 1997) ("[T]he impact of the prosecutor's inappropriate comment was mitigated by the district court's curative instructions."); *United States v. Smith*, 918 F.2d 1551, 1562 (11th Cir.1990) ("Because statements and arguments of counsel are not evidence, improper statements can be rectified by the district court's instruction to the jury that only the evidence in the case be considered.").

The prosecution's use of the autopsy photographs during rebuttal closing argument was improper. At oral argument, the State contended that the gruesome nature of the accident necessitated the admission of the photographs. Even accepting this, the prosecution used the photographs not to prove identity or the cause of death, but merely as a rhetorical flourish. As the state appellate court noted, the photographs "served no purpose other than to highlight the horror of their injuries and deaths." *Copertino*, 726 So.2d at 334.

Our inquiry is not, however, concluded once we agree with Copertino that the challenged actions by the prosecution were improper. We must ask whether, in the absence of the prosecutor's conduct, there was a reasonable probability that Copertino would have been acquitted of manslaughter by culpable negligence or of culpable negligence.

"Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury." Supreme Court Comm. on Standard Jury Instructions in Criminal Cases, *Florida Standard Jury Instructions in Criminal Cases* (2000) (instruction on manslaughter by culpable negligence); *see Russ v. State*, 191 So. 296, 299 (Fla. 1939) (describing culpable negligence as, at least, conduct "of a gross and flagrant character, evincing reckless disregard of human life or of the safety of persons exposed to its dangerous effects."), "[E]very case of manslaughter by culpable negligence must be determined upon the facts and circumstance peculiar to that case." *Filmon v. State*, 336 So. 2d 586, 590 (Fla. 1976).

At oral argument, defense counsel argued that the prosecution's actions so inflamed the passions of the jury that it convicted Copertino without giving credence to his theory of the case, i.e., that the pinched brake line, and not Copertino's culpable negligence, caused the accident. According to the defense's expert witness, there was no physical way the car could have spun the way it did across the center divider unless the brake line had been damaged.

*Appendix A*

The record shows that Copertino's counsel vigorously presented this evidence to the jury and cross-examined the State's contrary testimony. However, the defense did not and could not dispute the compelling evidence of Copertino's culpability: he was driving from 85 to 90 miles per hour in a 50 miles-per-hour zone; the time was late evening, which reduced visibility; the vehicle was a compact car, filled with nine people; none of the backseat passengers wore seatbelts; and Copertino was a young and inexperienced driver who had held a license for less than a year.

The state appellate court upheld the conviction because "[d]riving this fast under these circumstances so logically evinces to us the required reckless disregard for human life or the consequences on the safety of his passengers contemplated by the statute that we frankly cannot see the plausibility of arguing otherwise." *Copertino*, 726 So. 2d at 333. While the record fails to reflect that guilt was the *only* conclusion possible, such overstatement alone is not a basis for a grant of relief.

When the district court granted habeas relief, it erred by failing to acknowledge an inescapable inference contained in the state appellate court's decision: the jury could accept the defendant's theory of a pinched brake line and still find him guilty because the defense theory in no way negates the overwhelming and undisputed evidence of Copertino's culpable conduct. The record fails to reflect a denial of due process. There was no reasonable probability that, in the absence of the three instances of prosecutorial impropriety, acquittal would have been the result of the jury's deliberations.

## IV.

The record precludes a determination that the state adjudication resulted in a decision that contravened or unreasonably applied clearly established federal law, or was based on an unreasonable application of the facts in light of the evidence. We REVERSE the district court's grant of habeas relief and REINSTATE the defendant's conviction.

*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

No. 01-10226

District Court Docket No.
00-08233-CV-KLR

NICHOLAS F. COPERTINO,

Plaintiff-Appellee,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Michael W. Moore, STATE OF FLORIDA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

**JUDGMENT**

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: December 12, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

## APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AFFIRMING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DATED AND FILED DECEMBER 7, 2000

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**
**NORTHERN DIVISION**

Case No. 00-8233-CIV-RYSKAMP/VITUNAC

NICHOLAS F. COPERTINO,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary of the Florida Department of Corrections, and THE STATE OF FLORIDA,

Respondents.

**ORDER AFFIRMING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

THIS CAUSE came before the Court upon the Report and Recommendation issued by Magistrate Judge Vitunac on September 6, 2000 advising this Court to grant Petitioner's Amended Petition for Writ of Habeas Corpus. **[DE 18]** The respondent timely filed his objections on September 20, 2000.

*Appendix B*

THE COURT has considered the Report and Recommendation and the pertinent portions of the record, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED that the United States Magistrate Judge's Report and Recommendation be, and the same is hereby, RATIFIED, AFFIRMED and APPROVED with the following exceptions and observations. **[DE 18]**

## I. BACKGROUND

The Court adopts the Magistrate's findings of fact with the following exceptions.

1. The Magistrate's Report stated that photographs of the deceased passengers were placed face up on the jury rail and that the family members sobbed and wailed. (Report at 22-23.). In their Objections, Respondents argue that the record does not show

> whether the photos were face up or face down on the jury rail . . . [or] whether the photos were in a single stack or spread out on the jury rail. It is not for the Magistrate Judge to come to such crucial factual determinations based on vague references in the record and based on allegations in written documents submitted by a habeas petitioner.

(Objections at 9.). Petitioner's counsel, on the other hand, stresses that he made a proffer to put these events on the record and that neither the prosecutors nor the judge at that time responded that his proffer was inaccurate. (Corrected

Reply at 9-10.). Respondents object that the Magistrate's factual findings were based on these unsworn representations made by counsel for Petitioner.

There is clearly a dispute as to the facts in question. Counsel for Petitioner has filed an affidavit stating that "the prosecutor laid the autopsy photographs of the deceased teenagers on the jury rail inviting the jurors to meet each one of the teenagers by name." (Nameroff Aff. ¶ 1.). Counsel's affidavit also states that the family members of the victims "wail[ed] loudly in grief." (*Id.* ¶ 3.). Respondents have filed motions to accept the certificate of the trial judge and the affidavit of Victim/Witness Coordinator Sophie Brown, which deny that family members sobbed loudly. The affidavit of lead prosecutor Assistant State Attorney Ellen Roberts states that the autopsy photographs were merely stacked on the jury rail. Petitioner has responded by filing a motion to strike these filings. However, in making its determination, the Court will not adopt the Magistrate's findings that the victims' family members wailed during the closing argument and that the photographs were laid out on the jury rail during the closing argument. The Court will consider the photographs only in relation to the impropriety of their admission into evidence and presentation during closing argument. It is clear, nonetheless, that the photographs *were* presented to the jury; ASA Roberts' affidavit states that "at no time during the State's closing argument were the victim's [sic] photographs displayed on the jury rail. The jury rail was used as a holding place for the photographs *after being shown to the jury*." (Roberts Aff. ¶ 3.) (emphasis added).

*Appendix B*

2. The Court also declines to adopt the Magistrate's factual finding that the prosecutor made an improper pre-trial statement that Petitioner drove "like a maniac and is responsible for killing five people." (Report at 25.). The Fourth District stated that "the prosecutor who tried the case for the state was quoted in the press as saying that defendant drove his car 'like a maniac and is responsible for killing five people.' " *Copertino v. State*, 726 So. 2d at 333 n.1. However, Respondents have objected to this statement in the Report, asserting that this remark was in fact made during a pre-trial hearing and then reported in the press, and not made as a press statement. (Objections at 15.). Indeed, the record shows that this remark was not made as a press statement. (Tr. at 30-31.). Therefore, the Court does not adopt this factual finding.

3. With regard to the "Is this a joke?" comment, Respondents claim that the Report fails to reveal that when Mr. Grossman was asked to identify Petitioner, Petitioner himself asked if he could stand up and the prosecutor told him to "go ahead." (Objections at 3-4.). However, the record is clear that the prosecutor, Assistant State Attorney Richard Penalta, asked, "Can you stand up?" (Tr. at 906.). The trial judge, when describing the events to clarify the record, "I think . . . [the defendant stood up] at the request of Mr. Penalta, what right he had to tell the defendant to stand up[.]" (Tr. at 1057-1058.). The judge asked ASA Penalta if his understanding was correct, and Penalta stated that "the defendant stated, 'Can I stand up?' [and] I said, 'Go ahead.' " (Tr. at 1058.). It appears from the record that the Magistrate was correct in stating that Petitioner stood at ASA Penalta's request. (Report at 17.).

4. Respondents argue that there were not five offers to stipulate as to the identity of the deceased victims, as the Magistrate stated, because, while there were in fact five offers, three of these offers were made within six pages of each other in the transcript and some were made after the trial judge ruled the photographs were admissible. (Objections at 8.). The fact that these three offers may have been made within minutes of each other does not change the fact that five offers were made.

5. Respondents object that the Magistrate's Report implies that ASA Roberts first used the term "blackmail." However, the Magistrate's Report makes it clear that Roberts used this term in response to Petitioner's counsel's use of the term, noting that Roberts stated, "Yes, it is blackmail." (Report at 22.).

6. Respondents object to the Magistrate's statement that "ASA Penalta admitted on record that he had personally escorted potential jurors out of the court house and across the street during a break." (Report at 25.). Respondents correctly argue that the record shows that the courthouse was evacuated due to a bomb threat and that Penalta explained that he escorted the victims' families out of the courthouse and across the street and kept them separated from the potential jurors. (Objections at 16.). Responding to Petitioner's counsel's concerns that the potential jurors had had contact with the victims' families, ASA Roberts stated that "[t]o the best of my knowledge, Mr. Penalta was with our victims' families, and they did not address any of the jurors[,]" and Penalta stated that "I walked them across the road[.]" (Tr. at 285.). Therefore, as the record is clear that Penalta did not escort potential jurors, the Court does not adopt this factual finding.

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## II. DISCUSSION

### A. Standard on Habeas Review

The function of federal habeas relief is "to ensure that state convictions comport with established federal law at the time a petitioner's conviction becomes final." *Sawyer v. Smith*, 497 U.S. 227, 228, 110 S. Ct. 2822, 2824 (1990). 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> (1) resulted in a decision that was *contrary to, or involved an unreasonable application of, clearly established Federal law*, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (emphasis added).

The state court's factual findings are presumed to be correct, and a petitioner has the burden of rebutting this presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(l).

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In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), the Supreme Court held that a federal court applying § 2254(d)(1) could, under the "unreasonable application" clause, grant the writ "if the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 1520 (O'Connor, J.). In addition, a state court decision involves an unreasonable application of Supreme Court precedent "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* Rejecting the Fourth Circuit's "reasonable jurist" standard, the Court stated that the federal habeas court should inquire whether the state court's application was *objectively unreasonable*, and not simply whether, in the federal court's independent judgment, the application was erroneous or incorrect. *See id* at 1521-22.

Where the state court has not identified the applicable federal law in making its determination, the courts of other circuits have concluded that "[c]onducting an independent review of the record and applicable federal law when the state has not articulated its reasoning . . . provides the method for ascertaining whether the state court's resolution of the case was 'contrary to, or involved an unreasonable application of, clearly established federal law' under AEDPA." *Aycox v. Lytle*, 196 F.3d 1174, 1177-78 (10th Cir. 1999) (quoting *Delgado v. Lewis*, 181 F.3d 1087, 1091 n.3 (9th Cir. 1999)).[1]

1. In this case, the Fourth District did not identify the applicable federal law in its determination of whether errors including the admission of the autopsy photographs and the "young Mr. Hitler" remark required a new trial.

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**B. Standard of Review of Magistrate's Decision**

Under Federal Rule of Civil Procedure 72(b), after the magistrate judge has entered a report and recommendation in a prisoner petition, "[t]he district judge to whom the case is assigned shall make a de novo determination upon the record." Fed. R. Civ. P. 72(b).

**C. The Magistrate Correctly Concluded that the Fourth District Court of Appeal Unreasonably Applied Federal Law.**

Although not citing to *Williams*, the Magistrate's Report examines whether the Fourth District Court of Appeal ("Fourth District") unreasonably applied the law of the Supreme Court to the facts of this case. Citing *Donnelly v. De Christoforo*, 416 U.S. 637, 645 (1974), the Magistrate stated that "[t]he standard for reviewing a claim of prosecutorial misconduct in a habeas corpus case is whether the prosecutor's actions are of such a nature as to render the trial so fundamentally unfair as to deny the defendant due process." (Report at 14.). The Magistrate then considered the analysis of the Fourth District and the conditions of the trial in determining whether Petitioner's trial was fundamentally unfair. It should be noted that in this case, as in *Aycox*, the state court appears not to have specifically considered the arguments made by Petitioner based on federal law; with respect to the issues concerned in the Petition, only one Supreme Court case was cited. However, the Fourth District makes reference to conditions necessitating a new trial and therefore presumably it was considering Petitioner's arguments that his federal due process rights were violated.

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First, the Fourth District concluded that "the admission of the autopsy photographs served no purpose other than to highlight the horror of [the victims'] injuries and deaths and was therefore improper. Plainly the prosecutor's 'young Mr. Hitler' remark, too, is improper." *Copertino v. State*, 726 So. 2d at 334. Nevertheless, the court found that while

> [o]rdinarily it would be difficult for us to find the combined errors of the photos and the Hitler remark to be harmless, . . . [g]iven the nature of defendant's conduct — driving 90 mph at night in a metropolitan area with a small car overloaded with passengers — we do not believe that either of these errors or their combined effect contributed to the jury's decision. The state's evidence in this case is so compelling that the jury returned the only verdict possible.

*Id.*

With regard to the admission of the autopsy photographs, the prosecutor clearly admitted that they were not necessary, but used them to bargain with defense counsel to allow the admission of a video tape simulation of the accident.[2]

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2. Respondents have argued strenuously that the Magistrate erred in stating that the prosecutor first used the term blackmail, asserting that defense counsel first described the prosecutor's actions as blackmail, to which she responded, "Yes, it is blackmail." The Court does not give any weight to the prosecutor's use of the word, but merely to her acknowledgment that the photographs were unnecessary and offered as a means to coerce the defense into allowing the admission of the video tape. Both the video tape and the autopsy photographs, whichever were admitted, would improperly inflame the jury.

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The Fourth District Court of Appeal noted the impropriety of the admission of the photographs, but concluded that it was merely harmless error. *See id.* at 334. The Fourth District made absolutely no reference to Petitioner's theory that the accident was caused by damage to his right rear brake line, a theory that was supported by compelling evidence.

The Supreme Court has stated that the federal and state harmless error rules "block setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial." *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 827 (1967); *United States v. Hasting*, 461 U.S. 499, 508, 103 S. Ct. 1974, 1980 (1983). "The question a reviewing court must ask is this: absent the prosecutor's [misconduct], is it clear beyond a reasonable doubt that the jury would have returned a verdict of guilty?" *Hasting*, 461 U.S. at 510-511, 103 S. Ct. at 1981 (citing *Harrington v. California*, 395 U.S. 250, 254, 89 S. Ct. 1726, 1728 (1969)).

In the present case, as the Magistrate concluded, compelling testimony supports Petitioner's theory of defense that an object in the road pinched his right rear brake line, causing him to lose control of the vehicle and ultimately crash. (Report at 29-32.). The Fourth District Court of Appeal apparently did not consider this evidence strongly favoring Petitioner. Indeed, the State's witness, Sergeant Altieri, noted that the skid marks left by Petitioner's car demonstrated that the car "did things [Altieri] didn't expect it to do[.]" (Tr. at 592.). Petitioner's expert witness, Dr. Joseph A. Waddleworth, presented strong testimony that but for the damage to the brake line, the car would have braked in a straight line, and no accident would have occurred.

(Tr. at 1085-88.). Therefore, the Magistrate correctly concluded that the Fourth District unreasonably applied federal law to the facts of this case in finding that these instances of misconduct amounted to harmless error.

Because the Fourth District failed to fully consider Petitioner's due process arguments based on prosecutorial misconduct, the Magistrate independently reviewed them. *See Aycox*, 196 F.3d at 1177-78. The Supreme Court has characterized the proper conduct of a prosecutor as follows:

> He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.[3]

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3. While the *Berger* Court considered the role of a federal prosecutor rather than a state prosecutor, the right to a fair trial is protected by the due process clause of the Fourteenth Amendment and therefore, these statements clearly apply to state prosecutors as well. *See Donnelly*, 416 U.S. at 649, 94 S. Ct. at 1874 (Douglas, J., dissenting).

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*Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935).

The Supreme Court has held that "[t]he relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471(1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431(1974)). The prosecutor's "statements or conduct must be viewed in context and only by so doing can it be determined whether prosecutor's conduct affected fairness of the trial." *United States v. Young*, 470 U.S. 1, 11, 105 S. Ct. 1038, 1044 (1985). The Magistrate applied the factors outlined in *Davis v. Zant*, 36 F.3d 1538, 1546 (11th Cir. 1994), a case involving prosecutorial remarks:

> [d]ifferent factors have been utilized by various courts in order to decide whether of not the cumulative errors at trial could be said to have, in reasonable probability, changed the result at trial including: 1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; 2) whether they are isolated or extensive; 3) whether they were deliberately or accidentally placed before the jury; and 4) the strength of the competent proof to establish the guilt of the accused.

*Id.* Respondents argue that the test articulated in *Davis v. Zant* is only applicable in cases dealing with prosecutorial remarks and therefore the issue involving the autopsy photo-

graphs should have been separately analyzed.[4] As Respondents point out, the cases relied on by the Davis court, *Donnelly and Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (en banc), involved remarks by the prosecutor. However, more generally, the *Donnelly*, *Brooks* and *Davis* courts all considered, among other issues, prosecutorial misconduct during closing arguments. The *Davis* court noted that the courts should consider a "comment *or action*" made during prosecutorial argument. *Davis*, 36 F.3d at 1546 (emphasis added). In the present case, the Magistrate considered ASA Roberts' presentation of the autopsy photographs to the jury during her closing argument in conjunction with her invitation to the jurors to "meet" each of the deceased victims. (Tr. at 1400-01.). During her closing argument, ASA Roberts stated:

> To you, ladies and gentlemen, you sat five days with the defendant. You met Lisa, you met Petra, you met Mr. Grossman, you met Emily. You didn't meet Maribel but she was pointed out to you in the courtroom.

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4. Respondents cite *Smallwood v. Gibson*, 191 F.3d 1257, 1274-76 (10th Cir. 1999), in which the court considered the *admission* of autopsy photographs separately from the statements of the prosecutor that, allegedly, improperly attacked defense counsel and the defendant and stated personal opinions. However, in that case, as in the present one, the court noted that in determining whether the conduct rendered the entire proceedings fundamentally unfair, "we consider the totality of the circumstances, evaluating the prosecutor's conduct in the context of the whole trial." *Id.* at 1276 (internal quotation marks and citation omitted). Furthermore, in the present case, the Court considers not only the admission of the autopsy photographs, but their presentation to the jury in conjunction with remarks calculated to inflame the jury.

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> Who you didn't meet was Dori, Ryan, Carolina, Margaux, and Crystal and I apologize to the families.
>
> Ladies and gentlemen, Carolina Gill, Margaux Schehr, Dori Slosberg, Ryan Rashidian, and last but not least, Crystal Cordes.

(Tr. at 1400-01). While the Court has declined to adopt the Magistrate's finding that the photographs were laid out on the jury rail, ASA Roberts *has* stated that the autopsy photographs were shown to the jury. (Roberts Aff. ¶ 3.). Thus, the Magistrate correctly concluded that the "photographs themselves [were] unfairly prejudicial because neither cause of death nor identity was at issue in the case" and that the "context in which the photos were displayed for the jury was itself inflammatory and prejudicial." (Report at 23.).

Respondents also object to the Magistrate's application of the test to the facts of this case. Respondents assert that the Magistrate engaged in "guesswork" in conjecturing how the jury might construe the "Is this a joke?" comment. However, such considerations are necessary in determining whether a prosecutorial remark could have an effect on a jury such that would violate due process.

Respondents further argue that the comments were isolated and that therefore one of the factors in *Davis v. Zant* weighs against a finding of a due process violation. Respondents argue that the Magistrate has combed the record and pointed out all other instances of possible prosecutorial misconduct, stating that these instances are procedurally

barred. However, the other instances of improper behavior were cited as other attempts by the prosecutor to inflame the jury and prejudice the Defendant. Similarly, in *Davis*, the court noted that the challenged remarks

> were not isolated comments; they were part and parcel of a concentrated use of misrepresentation clearly aimed at discrediting the core of the defense. The repetitive nature of the comments distinguishes the instant case from those such as *Donnelly*, where the "impropriety was but one moment in an extended trial and was followed by specific disapproving instructions."

*Davis*, 36 F.3d at 1550.

Respondents have objected to the Magistrate's conclusion that the conduct of the prosecutors was deliberate.[5] Unbelievably, Respondents state that the "young Mr. Hitler" and "Is this a joke?" comments were "both accidental in nature." (Objections at 18.). The Court must conclude that these remarks made by the prosecutors can only be explained as (1) made intentionally; (2) made without knowledge that they were improper;[6] or (3) made while the prosecutors

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5. Respondents argue that the Magistrate erred in finding that the prosecutor had five opportunities to stipulate to identity and in allegedly implying that the term "blackmail" was first used by ASA Roberts. These arguments have been considered in Part I of this Order.

6. Respondents have since stated that the "young Mr. Hitler" statement was indeed improper. (Response at 31.).

were so emotionally involved that they were out of control.[7] The Magistrate concluded after considering the trial as a whole that the actions of ASA Roberts, if not the "Is this a joke?" remark by ASA Penalta, demonstrate an intent to invoke the passions of the jury and vilify Petitioner.

Most importantly, the Magistrate noted the strength of Petitioner's case in determining that there was a reasonable probability that the jury would have come to a different conclusion but for the prosecutorial misconduct.

Therefore, the Magistrate correctly concluded that the Fourth District unreasonably applied federal law, as promulgated by the Supreme Court, to the facts of this case and that the cumulative effect of the State's misconduct rendered Petitioner's trial fundamentally unfair and necessitated the overturning of Petitioner's conviction.

**D. The Magistrate Correctly Concluded that the Fourth District's Decision Was Based on an Unreasonable Determination of the Facts.**

The district court may grant habeas corpus relief when the adjudication of the claim in state court "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

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7. Indeed, the Fourth District stated that ASA Ellen Roberts "engaged in conduct throughout the trial suggesting too much a personal interest in winning, rather than detached advocacy for the state." *Copertino v. State*, 726 So. 2d at 334 n.2.

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In *Bottoson v. Moore*, No. 98-2886, 2000 WL 1752180, at *12 (11th Cir. Nov. 29, 2000), the Eleventh Circuit examined the evidence presented to the state court to determine if the court's decision to discount testimony suggesting that petitioner was experiencing an episode of schizophrenia while committing murders was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. The Eleventh Circuit considered evidence of witnesses who observed the petitioner during the time frame of the crime, the testimony of psychiatrists and the actions of the petitioner to determine whether the petitioner indeed was experiencing such an episode and determined that

> [w]hile there is some evidence suggesting the possibility that Bottoson was experiencing an acute or active episode of schizophrenia, stronger evidence suggests that he was not. Under these circumstances, we cannot conclude that the decision of the state court in this respect was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See 28 U.S.C. § 2254(d)(2). Thus, accepting the fact that Bottoson was not experiencing an acute or active episode of schizophrenia during the time frame of the offense, we cannot conclude that the state court was unreasonable in determining that Bottoson's latent mental illness played an insignificant role with respect to the motivation of Bottoson's actions in committing the instant crimes.

*Id.*

Similarly, in the present case, the Fourth District appears to have discounted the evidence supporting Petitioner's theory that damage to his right rear brake line resulted in loss of control of the car. However, as detailed above and in the Magistrate's Report, substantial evidence presented by Petitioner supports this theory and is sufficient to rebut the presumption that the state court's findings of fact are correct. Therefore, the Fourth District's decision to ignore the brake-line theory in determining whether Petitioner was guilty of culpable negligence and its determination that the "state's evidence in this case is so compelling that the jury rendered the only verdict possible[,]" *Copertino v. State*, 726 So. 2d at 334, represents "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). For this reason, as well as its unreasonable application of federal law under § 2254(d)(l), Petitioner's conviction must be overturned.

**E. Respondents' Objections to the Magistrate's Report and Recommendation**

As Respondents note, 28 U.S.C. § 636(b)(1)(B) instructs that after timely filing of objections to a magistrate's report and recommendation, "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." Respondents have made numerous objections to the Magistrate's Report and Recommendation, including some relating to factual matters discussed above. The Court will now address Respondents' remaining objections.

*Appendix B*

## 1. Review of Florida Law on Culpable Negligence

Respondents have stressed that this Court is not an appellate court to determine whether the state courts have made the right decisions. Indeed, this Court examines the state court proceedings only to determine if Petitioner's constitutionally-protected due process rights were violated. The Fourth District Court of Appeals has the right to determine what will constitute culpable negligence under Florida law. In fact, in this case, it appears to have amended the established law in Florida by holding that excessive speed alone may be sufficient to constitute culpable negligence.[8]

To determine if the errors at trial warrant reversal, the court must determine how compelling Petitioner's case was. (Report at 27.). While the Magistrate lays out the

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8. The Fourth District noted that the proposition that speed alone is insufficient to convict of manslaughter by culpable negligence originated in *Russ v. State*, 140 Fla. 217,191 So. 296 (1939), but pointed out that the *Russ* court examined the entire evidence in determining that it

> did not rise to a level evincing reckless disregard for human life or the safety of persons exposed to its effects. . . . Hence the speed of defendant's vehicle, even if in excess of the limit, did not seem to play so important a role in the court's determination as did the conduct of the deceased.

*Copertino v. State*, 726 So. 2d 330, 332 (Fla. 4th DCA 1999), *rev. denied*, 735 So. 2d 1284 (Fla. 1999). The Fourth District stated that "it is one thing to speed slightly over the posted limit," as the defendant in *Russ* did, and "it is quite another matter to drive at such an immensely excessive rate that no one could reasonably drive." *Id.*

state law and the Fourth District's apparent alteration, the Magistrate ultimately found only that the evidence against Petitioner was not overwhelming, the finding required by *Davis*.[9]

**2. The "Is this a joke?" Comment and Procedural Bars**

Respondents assert that the Magistrate did not consider their procedural bar argument. The Supreme Court has stated that

> [t]he mere existence of a basis for a state procedural bar does not deprive this Court of jurisdiction; the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case. *See Ulster County Court v. Allen*, 442 U.S. 140, 152-154, 99 S. Ct. 2213, 2222-2223, 60 L. Ed. 2d 777 (1979). Moreover, we will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-1041, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201 (1983).

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9. Respondents have objected to the Magistrate's statement that credible evidence was presented, stating that credibility determinations cannot be made when considering the cold record. Clearly, the Magistrate did not intend to make a credibility determination but rather considered, under the fourth prong of Davis, "the strength of the competent proof to establish the guilt of the accused." *Davis*, 36 F.3d at 1546.

*Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S. Ct. 2633, 2638 (1985). In the present case, the Fourth District did not discuss the "Is this a joke?" comment and therefore, the existence of a procedural bar would not strip the Court of jurisdiction to consider this issue. In addition, the Magistrate considered not just this comment, but the trial as a whole to determine whether it was fundamentally unfair and whether Petitioner was denied his due process rights. The Magistrate concluded that because the comment was not a comment on silence it was not "constitutionally improper." Respondents assert that "[s]ince it is not constitutionally improper this must be the end to the review by the Federal Magistrate Judge." (Objections at 3.). However, this is clearly not the end of the analysis because, despite the absence of constitutional impropriety, the comment must be considered in making the due process analysis.

**3. "Young Mr. Hitler" and Curative Instructions**

Respondents state that the Magistrate did not consider their argument that the trial judge gave an immediate curative instruction to the jury following the prosecutor's "young Mr. Hitler" remark and thus this remark was rendered harmless. Indeed, the Eleventh Circuit has stated that "a prejudicial remark may be rendered harmless by curative instructive to the jury." *United States v. Calderon*, 127 F.3d 1314, 1334 (11th Cir. 1997). However, in this case, the curative instruction to the jury was far from sufficient. (Tr. at 1383.). The judge merely stated "Ladies and gentlemen . . . I am instructing you, you will disregard the last comment before the apology of the prosecutor. Please continue." (*Id.*). The lack of emphasis on the impropriety of this remark makes this curative instruction clearly insufficient.

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## III. CONCLUSION

Considering the factors as a whole, the Court determines that Petitioner's due process rights were violated. It is therefore

ORDERED AND ADJUDGED

Petitioner's Amended Petition for Writ of Habeas Corpus, filed pursuant to 28 U.S.C. § 2254, is GRANTED. **[DE 12]** Petitioner's conviction is VACATED.

The Clerk of the Court SHALL CLOSE this case and DENY all pending motions as MOOT.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 7 day of December, 2000.

s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

## APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED SEPTEMBER 6, 2000

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

Case No. 00-8233-Civ-Ryskamp/Vitunac

NICHOLAS F. COPERTINO,

Petitioner,

vs.

MICHAEL W. MOORE, Secretary of the Florida Department of Corrections, and THE STATE OF FLORIDA,

Respondents.

**REPORT AND RECOMMENDATION**

THIS CAUSE is before the Court on order of referral (DE 4) from United States District Judge Kenneth L. Ryskamp "for all pretrial matters to take all necessary and proper action as required by law and to submit a Report and Recommendation." For the reasons stated below, it is hereby RECOMMENDED that Petitioner's Amended Petition for Writ of Habeas Corpus (DE 12), filed pursuant to 28 U.S.C. § 2254, be GRANTED.

*Appendix C*

## BACKGROUND

Petitioner contends that the cumulative effect of several instances of prosecutorial misconduct deprived him of a fair trial in violation of the Due Process Clause of the Fifth Amendment to the United States Constitution. Petitioner alleges the following as incidents of prosecutorial misconduct:

(1) The State tampered with evidence by altering the jury view of Petitioner's damaged vehicle so as to prevent the jury from viewing the right rear brake line as it appeared immediately after the accident.

(2) Assistant State Attorney Richard Penalta ("ASA Penalta") stated to Petitioner in open court in front of the jury during a witness's identification of Petitioner, "Is this a joke, sir?"

(3) Assistant State Attorney Ellen Roberts ("ASA Roberts") referred to Petitioner as "young Mr. Hitler" during closing rebuttal argument.

(4) The State introduced autopsy photographs of the victims into evidence and presented such photographs to the jury during closing rebuttal argument attempting to "unfairly inflame the passions of the jury against Petitioner."

(Amended Petition for Writ of Habeas Corpus ("Amend. Pet.") (DE 12) at 5.)

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Respondent argues that any alleged incidents of prosecutorial misconduct at Petitioner's trial do not rise to the level of constitutional error. Respondent claims that the State did not tamper with evidence with respect to the jury view of Petitioner's wrecked vehicle. Respondent admits that introduction of the autopsy photographs was improper, but asserts that it does not constitute reversible error because it was a minor part of its case. The State argues that the prosecutor's improper reference to Petitioner during closing argument as "young Mr. Hitler" was deemed harmless by the curative instruction given by the trial court and apology given in front of the jury by the prosecutor. Finally, with respect to the State's "Is this a joke, sir?" statement, Respondent contends that the statement was not necessarily directed at Petitioner and that Petitioner is precluded from arguing the point because he failed to contemporaneously object at trial.

## A. *PROCEDURAL HISTORY*

On April 22, 1996, Petitioner was charged by information in Florida state court with five counts of manslaughter by culpable negligence, six counts of culpable negligence, and five counts of vehicular homicide. (Response to Petition ("Response") (DE 8) at 1.) The charges against Petitioner stemmed from an automobile crash that took place on February 23, 1996, in which Petitioner was the driver and five teenaged passengers were killed and another was permanently paralyzed. *Id.* at 3-6. On May 20, 1997, a West Palm Beach jury convicted Petitioner of five counts of manslaughter by culpable negligence and six counts of

culpable negligence.[1] (Response, R-1.) On June 30, 1997, Petitioner was sentenced to fifteen years of incarceration on each count, to run concurrently. *Id.*

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1. In order to convict Petitioner of manslaughter by culpable negligence, the State had to prove beyond a reasonable doubt that the victim was dead and that the death of the victim was caused by Petitioner's reckless disregard for human life or the safety of others. (Tr. 1409); *See* § 782.07, Fla. Stat. (1999); *Russ v. State*, 191 So. 296, 299 (1939); Fla. Std. Jury Instr. (Crim.) § 782.07. The standard jury instruction on "culpable negligence" given to the jury was as follows:

I will now define culpable negligence for you. Each of us has a duty to act reasonably toward others. If there is a violation of that duty, without any conscious intention to harm, that violation is negligence.

But culpable negligence is more than a failure to use ordinary care toward others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard of human life or the safety of persons exposed to its dangerous effects, or such an entire want of care as to raise a presumption of a conscious indifference to consequences, or which shows wantonness or recklessness, or a grossly careless disregard of the safety and welfare of the public, or such an indifference to the rights of others as is equivalent to an intentional violation of such rights.

The negligent act or omission must have been committed with an utter disregard for the safety of others. Culpable negligence is consciously doing an act or following a course of conduct that the defendant must have known, or reasonably should have known, was likely to cause death or great bodily injury.

(Tr. 1410-1411.)

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On June 28, 1998, Petitioner filed an appeal with the Fourth District Court of Appeal ("Fourth District") raising the following three arguments: (1) that excessive speed combined with brake malfunction is insufficient evidence to convict Petitioner, (2) that the trial court erred in denying Petitioner's motion for a change of venue, and (3) that prosecutorial misconduct was so prejudicial as to require reversal of Petitioner's conviction. *Id.* at 2, R-2. The Fourth District affirmed Petitioner's conviction in a written opinion on January 20, 1999. *See Copertino v. State*, 726 So. 2d 330 (Fla. 4th DCA 1999), *rev. denied*, 735 So. 2d 1284 (Fla. 1999). On April 5, 1999, mandate issued. (Response at 2, R-2.)

On June 24, 1999, the Florida Supreme Court denied Petitioner's application for discretionary review. *See Copertino v. State*, 726 So. 2d 339 (Fla. June 24, 1999) (Table). Petitioner filed no collateral attacks on his sentence or conviction in state court.

On March 15, 2000, Petitioner filed his present Petition for Writ of Habeas Corpus by a Person in State Custody, pursuant to 28 U.S.C. § 2254 (DE 1), and accompanying memorandum of law in support (DE 2). On March 22, 2000, this Court ordered the State to respond (DE 5). The State filed a Response (DE 8) on May 9, 2000. Petitioner filed a reply brief ("Reply") (DE 9) on May 16, 2000.

On May 23, 2000 (DE 11), this Court recommended that Petitioner's § 2254 petition be denied without prejudice because it contained both exhausted and unexhausted claims. On May 31, 2000 (DE 12, 13), Petitioner filed an objection to this Court's Report and Recommendation along with an

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Amended § 2254 Petition which contained only that claim which he had exhausted at the state level. On June 13, 2000, the District Court adopted this Court's recommendation that Petitioner's original petition be dismissed without prejudice, but granted Petitioner leave to amend his petition to include only his exhausted claims (DE 14). The District Court's Order filed June 13, 2000, also stated that Petitioner's Amended Petition is considered filed and is referred to this Court "for all pretrial matters and to take all necessary and proper action as required by law and to submit a report and recommendation."

**B. *FACTUAL BACKGROUND***

On Friday, February 23, 1996, at approximately 9:45 p.m., Petitioner, Nicholas Copertino, was driving westbound on Palmetto Park Road in Boca Raton, Florida. (Trial Transcript ("Tr.") 443-444.) Petitioner was driving his 1995 four-door Honda Civic. (Tr. 444.) At the time, Petitioner was nineteen years old and had obtained his driver's license eleven months earlier. (Tr. 561.) In the front seats of Petitioner's car were Petitioner and David Grossman, both of whom were wearing seat belts. (Tr. 481, 865, 868, 869.) In the back seat of Petitioner's vehicle were seven other teenagers: Emily Slosberg, Dori Slosberg, Carolina Gill, Maribel Farinas, Crystal Cordes, Margaux Schehr, and Ryan Rashidian. (Tr. 476.) None of the backseat passengers was wearing a seatbelt. (Tr. 481, 731.) The backseat passengers were sitting on each others' laps in a manner described by a survivor as "packed" and "tight." (Tr. 731, 778.)

Palmetto Park Road is a six lane "main thoroughfare," with three westbound and three eastbound lanes divided by

a nine-foot wide median. (Tr. 468, 469.) According to Florida Highway Patrol Sergeant Thomas Altieri ("Sergeant Altieri"), who investigated the crash for the State, the area in which the crash occurred is "pretty open," and weekend traffic at night is "moderate" to "light." (Tr. 467-468, 468-469.) The speed limit on Palmetto Park Road is fifty (50) miles per hour, but Palm Beach Sheriff's Office Lieutenant Louis Sessa, who also participated in the crash investigation, admitted stating previously under oath that speeds of 80 to 85 miles per hour were typical, primarily because the area is "vastly unincorporated" and not developed yet. (Tr. 471, 965-966, 967.) The traffic on the night of the accident was described by witnesses as "moderate," with few cars on the road at the time. (Tr. 682, 689.) The weather was described as "clear." (Tr. 482.)

While driving west on Palmetto Park Road, about three-tenths of a mile east of Lyons Road, Petitioner's vehicle spun out of control and proceeded across the median and into the eastbound lanes of Palmetto Park. (Tr. 444, 447-448, 467.) Once across the median, Petitioner's vehicle struck an east-bound 1992 Acura, driven by Lisa Boccia, the Acura impacted head-on with the right rear section of Petitioner's Honda. (Tr. 444, 448.) The collision caused the Honda to rotate clockwise, ejecting the backseat passengers. (Tr. 448.) The backseat passengers of Petitioner's vehicle were "all over the south shoulder of Palmetto Park," some on the curb and some on the sidewalk. (Tr. 434.) Back seat passengers Ryan Rashidian, Dori Slosberg, Margaux Schehr, Crystal Cordes, and Carolina Gill were killed. (Tr. 643-646, 660-665.) Back seat passengers Emily Slosberg and Maribel Farinas were severely injured, the latter of whom is now a quadriplegic as a result of the accident. (Tr. 725-726.) Ms. Boccia, along with

her passengers, Tammy Mikolajczac and Petra Rettig, survived the crash with significant injuries. (Tr. 699-700, 713-714.) Petitioner and Mr. Grossman sustained less serious injuries. (Tr. 699-700, 713-714.)

1. *The State's Theory*

The State presented evidence to establish that Petitioner's speed, along with the circumstances surrounding his driving, e.g., the number of persons in the vehicle, the manner in which he was driving, the excessive speed, to demonstrate that Petitioner had engaged in a reckless disregard for human life or the safety of others.

The evidence at trial showed that Petitioner was traveling at a rate of speed of approximately ninety (90) miles per hour. (Tr. 548.) Petitioner does not dispute this calculation. Other evidence at trial concerning the manner of Petitioner's driving on the night of the crash is conflicting. At trial, Dr. Phyllis J. Jonas testified that she was traveling westbound on Palmetto Park when she observed Petitioner pass her driving "very fast," approximately 75 to 80 miles per hour. (Tr. 669, 671.) Dr. Jonas also testified that Petitioner did not exhibit any erratic driving behavior other than his speed. (Tr. 675.) Hooman Raffiee, also traveling westbound, testified that Petitioner tailgated him in the far right lane, then merged into the far left lane of traffic traveling at approximately 60 miles per hour. (Tr. 683-684.) Backseat passenger Emily Slosberg testified that Petitioner was driving "a lot faster than those cars that were going by," that he was "going too fast, and like, just driving like wild," and that Petitioner "almost" got into an accident a few minutes before the crash. (Tr. 735, 737, 789.) Ms. Slosberg,

however, admitted under cross-examination that she gave a sworn statement to Sergeant Altieri on March 1, 1996, at the Delray Community Hospital stating that Petitioner's driving was "fine up until the accident." (Tr. 763-765.) At trial, Ms. Slosberg said that she "probably" meant Petitioner's driving was fine up until the "almost accident." (Tr. 764, 783.)

Front seat passenger David Grossman testified that Petitioner's driving was "normal," and that Petitioner was not passing cars, "fooling around," or weaving across the three lanes of westbound traffic. (Tr. 885, 911.) Mr. Grossman gave a sworn statement to a State Trooper near the time of the crash that was consistent with his trial testimony. (Tr. 908.)

There was no evidence at trial that Petitioner was under the influence of drugs or alcohol at the time of the accident. Blood was taken from the Petitioner after the accident and tested negative for drugs or alcohol. (Tr. 453-457, 951-961.) In fact, the trial judge instructed the State that "there is no alcohol involved in this case." (Tr. 370.) ASA Roberts nevertheless stated during closing arguments that there was no evidence to prove that Petitioner had not been drinking on the night of the accident. (Tr. 1398-1399.)

The State contended at trial that the weight of the nine passengers in Petitioner's vehicle contributed to the cause of accident by causing the car to spin. The State relied heavily on the opinion testimony of Sergeant Altieri. At the time of trial, Sergeant Altieri had been employed by the Florida Highway Patrol for thirteen years. (Tr. 465.) He had served as a corporal in the traffic homicide during which he received training in traffic homicide investigation and accident

reconstruction. (Tr. 465-466.) Four months prior to the trial, Altieri was promoted to sergeant. (Tr. 465.) Sergeant Altieri testified that he had investigated "thousands" of accidents including approximately forty five traffic homicides. (Tr. 466-467.) In addition, Sergeant Altieri stated that he had earned a high school education, but had no education in advanced physics or civil engineering.[2] (Tr. 562.)

Sergeant Altieri testified that he believed that a weight shift within the vehicle may have caused the vehicle to rotate. (Tr. 548-550.) Sergeant Altieri admitted, however, that he had no evidence of such a weight shift and was rather "assuming there was" such an occurrence. (Tr. 556.) Sergeant Altieri also opined that the "casual application" of the brakes caused Petitioner's tires to lock up independently, meaning his front brakes locked before his rear brakes, thus causing a spin to occur. (Tr. 556-560.) According to Sergeant Altieri, the speed of such a spin would increase with the speed of the vehicle. (Tr. 557-558.)

At trial, Petitioner called Dr. Joseph A. Waddleworth of the University of Florida to testify. Dr. Waddleworth earned a bachelor's degree in engineering science and a master's degree in civil engineering from Dartmouth College, and earned both a master's degree and doctorate in traffic and transportation

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2. No witnesses at trial were recognized as experts. The trial court stated, " I don't declare people experts. That's up to the jury to decide whether they want to accept somebody as an expert . . . I don't sit up here in a black robe, telling these jurors that A, B, and C is an expert or isn't an expert. I'll let them make that determination." (Tr. 536, 538.) The trial court did, however, allow such witnesses to offer opinion testimony. (Tr. 537.)

engineering from Northwestern University. (Tr. 1061-1062.) Dr. Waddleworth has taught engineering courses at several universities and is head of the University of Florida's traffic and transportation engineering program. (Tr. 1062-1063.) Dr. Waddleworth engages in "private consulting engineering work, specializing in the area of traffic accident reconstruction." (Tr. 1061.) As a consultant, he has performed approximately 1800 accident reconstructions, and testified as an expert in over 165 civil and criminal trials. (Tr. 1065-1066.) Dr. Waddleworth testified that the weight of the vehicle had no bearing on the accident, and had no effect on braking distance or spinning of the vehicle. (Tr. 1088-1090.) Corroborating this opinion is the testimony of front seat passenger David Grossman who stated that he did not recall any weight shift prior to the accident. (Tr. 893.)

2. *The Defense's Theory*

Petitioner's theory of causation was that an object from the road had pinched his right rear brake line causing his vehicle to spin out of control because after Petitioner pressed and released the brakes, the right rear wheel failed to continue turning with the other three. (Tr. 407.) Dr. Waddleworth testified that he was given access to Petitioner's vehicle after the accident and that he observed Petitioner's pinched right rear brake line. (Tr. 1077.) Dr. Waddleworth also testified that he utilized accident reconstruction computer programs which showed that Petitioner's right rear brake line was pinched which cause one of the tires lock-up after Petitioner let his foot off the brake causing the vehicle to spin. (Tr. 1085-1087.) Dr. Waddleworth stated as well that his analysis of the skid marks supports the simulation's results. (Tr. 1087-1088.)

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In support of his theory, Petitioner also called Geofredo Alfonso. Mr. Alfonso is an certified mechanic, certified in engine repair, brake suspension, air conditioning, electrical, and engineer diagnostics. (Tr. 1125.) He had been a mechanic for sixteen years and has been certified since 1981. (Tr. 1125, 1134.) At the time of trial, Mr Alfonso was working as a body shop technician, specializing in brakes, suspensions, and running gear. (Tr. 1125, 1134.) Mr. Alfonso stated that upon inspecting Petitioner's wrecked vehicle, he immediately discovered that Petitioner's right rear brake line was pinched and damaged on the inside by some projectile which could have been "a piece of wood, a rock, [or] a piece of metal." (Tr. 1126-1129, 1130-1131, 1138-1142.) Mr. Alphonso testified that a pinched right rear brake line would cause a vehicle turning to the left to spin out of control. (Tr. 1126.) Mr. Alfonso also testified that compression from the accident could not have caused the damage to the brake line, and that his inspection showed no evidence of the damage coming from impact with the nearby shock absorber. (Tr. 1129, 1143-1144.) Petitioner moved into evidence a photograph that depicts this pinched brake line. (Def. Ex. 1.)

Sergeant Altieri admitted that he did not inspect Petitioner's brake lines after the accident, that skid marks left behind by the Honda indicated the vehicle "did things [he] didn't expect it to do," and that his investigation revealed evidence that Petitioner's left and right brakes did not lock at the same time. (Tr. 550, 592, 596.) Dr. Jonas, a westbound driver on Palmetto Park Road, testified that she observed a "long object" in the middle westbound lane of Palmetto Park Road that caused her to stop in the road short of the actual accident scene. (Tr. 677-680.) Passenger David Grossman

testified that Petitioner yelled, "Help!" twice just before the accident, and then turned around "when we hit something" in the road. (Tr. 883-884, 887, 888, 892.) Passenger Emily Slosberg testified that Petitioner looked toward the right rear of the vehicle just before losing control of the car. (Tr. 751-752, 754, 784.)

The State rebutted Petitioner's argument with testimony from Sergeant Altieri who testified that skid marks showed Petitioner had "a hundred percent braking capacity," meaning four working brakes at the time of the crash, and that he found no evidence of any object in the road besides crash debris. (Tr. 473, 560-561.) Sergeant Altieri also explained that casual braking could cause Petitioner's brakes to lock independently while still exhibiting full braking capacity. (Tr. 519-520.) In addition, during cross examination, Mr. Alfonso admitted that he did not test Petitioner's brake lines to determine whether they were working or not. (Tr. 1145.)

The State also called Florida Highway Patrol Corporal Robert Borman. Corporal Borman had been with the Florida Highway Patrol for 23 years and was a traffic homicide investigator. (Tr. 1201.) He has attended various courses at the Institute of Police Technology Management, and has taught courses in accident reconstruction for "Palm Beach County Gardens [sic]." (Tr. 1202.) He completed two years of college, but took no courses in engineering or accident reconstruction. (Tr. 1215-1216.) With respect to his experience with brakes, he stated, "I can install them and put them on myself, but I am no expert." (Tr. 1214.) Corporal Borman stated that he had analyzed Petitioner's vehicle during the trial, and that, in his opinion, a "small rock" could not have

caused the damage to Petitioner's right rear brake line. (Tr. 1227.) Corporal Borman also testified that he saw two yellow marks on the strut nearby the pinched brake line when he inspected the vehicle during the trial. (Tr. 1206-1207.) He admitted on cross examination, however, that he did not observe the condition of the brake line until after it had been repeatedly towed and was displayed upon the flatbed tow truck used for the jury viewing at trial, that he could not attest to the condition of the brake line after the accident, and that he could not state whether the brake line itself or debris from the ruptured line made marks on the nearby shock. (Tr. 1218, 1225.)

During the State's direct examination of David Grossman, the witness was asked to identify the driver of the Honda Civic on the night of the crash. (Tr. 906.) At ASA Penalta's request, Petitioner stood for this in-court identification, at which point ASA Penalta stated to him in front of the jury, "Is this a joke, sir?" (Tr. 906.) Petitioner's counsel moved for sanctions. (Tr. 906.) Neither at the time of the comment nor later was any curative instruction given by the trial court, and the trial judge merely stated, "Mr. Penalta . . . Move on." (Tr. 906-907.) ASA Roberts later explained to the court that ASA Penalta made the comment because "the Defendant stood up, spread his arms out, moved his arms and smiled" during the identification. (Tr. 1056-1057.)

Over defense objection, the autopsy photographs of four of the five deceased teenagers were introduced into evidence at trial. (Tr. 645-646 (Ryan Rashidian), 661-662 (Dori Slosberg), 662-663 (Margaux Schehr), 663-664 (Carolina Gill).) The autopsy photograph of victim Crystal Cordes was not

admitted into evidence because the court deemed it too inflammatory and prejudicial. (Tr. 615-617.) These photographs were admitted despite Petitioner's repeated offers to stipulate to the identity of the victims. (Tr. 610-618, 611-612, 615, 619-621, 625, 639.) ASA Roberts refused to accept any stipulation, and stated on the record during discussions with the trial court on this issue that it was her intention to use the pictures to "blackmail" Petitioner into stipulating to the admission of a videotape simulating nine persons in a Honda Civic.[3] (Tr. 613, 617.) "Yes, it is blackmail," ASA Roberts stated, "It is pictures of the car or else pictures of five dead children." (Tr. 613, 617.) ASA Roberts admitted that she had other pictures of the deceased teens available to show their identity. (Tr. 612, 614.)

In the midst of trial, and over Petitioner's objection, the jury was given an opportunity to view the two wrecked vehicles from the accident. (Tr. 840.) Petitioner objected to the jury view of the vehicles arguing that they were not in the same condition as immediately following the accident. (Tr. 627-630.) Specifically, Petitioner argued that the right rear area of the Honda Civic was purposefully tampered with by the State in order to distort the jury's viewing of the right rear brake line. (Tr. 821-823.) The State denied tampering with the vehicles, and reported that Petitioner's vehicle had been towed three times between the time of the accident and the viewing. (Tr. 832-833, 836.) The trial court allowed the viewing, but instructed the jury beforehand that the vehicles

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3. This videotape was deemed inadmissible by the trial court. (Tr. 939.)

were "not in the same state and condition as they were in immediately after the collision," and directed the jury to Petitioner's photograph "6G," which depicted the right rear brake line of the Honda. (Tr. 836-837; Def. Ex. 1.) Petitioner photographed the right rear tire of his vehicle as it appeared at the jury view. This photograph depicted that area of the car hanging off the end of the flatbed truck and apparently bearing much of the weight of the vehicle. (Def. Ex. 11.) Mr. Alfonso compared the photograph of the right rear brake line taken soon after the accident with the right rear tire as the time of the jury view, and testified that there was a difference in appearance was a caused by all of the weight of the vehicle being placed on that tire and caused it to "look like it is further up into the car." (Tr. 1127-1128,1131-1132.)

At the beginning of closing arguments, ASA Roberts argues that Palmetto Park Road was not "a race track," but was a "highway used by all of us." (Tr. 1305). In addition, despite being instructed by the trial judge not to "go beyond the podium or toward the jury," during closing argument, (Tr. 1295), ASA Roberts laid the autopsy photographs upon the jury rail and invited the jury to "meet" each victim by name. (Tr.1400-1401, 1461.) Meanwhile, according to Petitioner, "the mothers of the deceased teenagers began wailing at the top of their lungs," (Amend. Pet. at 8), and the display of the photographs caused some jurors to begin crying. (Reply at 9.)

Also, during closing argument, ASA Roberts made numerous references to the deceased as the "children," "those cute little girls," or "innocent child." (Tr. 1303, 1304, 1310, 1314, 1379, 1382, 1383, 1401.) ASA Roberts also referred

to Petitioner as "young Mr. Hitler." (Tr. 1382.) ASA Roberts specifically stated to the jury, "Well, first of all, we're going to blame the victims. We are going to blame the children, the children. They didn't ask young Mr. Hitler's over here permission — [objection] . . . to get into the car." (Tr. 1382.) After a defense motion for mistrial was denied without comment, the trial court instructed ASA Roberts to apologize. (Tr. 1383.) ASA Roberts then stated to the jury, "I have been asked to apologize, ladies and gentlemen, and I will for the comment that I made but it —." (Tr. 1383.) The trial judge then instructed the jury to disregard the comment. (Tr. 1383.)

## DISCUSSION

Petitioner was convicted by a jury of five counts of manslaughter by culpable negligence and six counts of culpable negligence. (Response, R-1.) Petitioner contends that the cumulative effect of a number of instances of prosecutorial misconduct deprived him of his right to due process of law under the United States Constitution. (Amend. Pet. at 7-9.)

The prosecutorial misconduct alleged by Petitioner includes: (1) deliberate manipulation of the jury's view of Petitioner's wrecked Honda, such that the jury could not accurately observe the right rear brake line; (2) a prosecutor stating to Petitioner during an in-court eyewitness identification, "Is this a joke, sir?"; (3) a prosecutor calling Petitioner "young Mr. Hitler" during closing argument;

and (4) admission and presentation of autopsy photographs of four of the deceased crash victims.[4]

## A. *STANDARD OF REVIEW*

The Fifth Amendment to the United States Constitution states that "No person shall . . . be deprived of life, liberty, or property without due process of law." United States Const., Amend. V. The Fifth Amendment right to due process is applied to the states through the Due Process Clause of the Fourteenth Amendment. *See Malloy v. Hogan*, 378 U.S. 1, 3-5 (1964).

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4. On direct appeal, the Fourth District Court of Appeals considered the issue of prosecutorial misconduct. *See Copertino*, 726 So. 2d at 334-335. However, the Fourth District summarily rejected this argument holding that the prosecutor's misconduct could not have constituted prejudicial error. *See id.* The Fourth District stated that "[g]iven the nature of defendant's conduct — driving 90 mph at night in a metropolitan area with a small car overloaded with passengers — we do not believe that either [the use of the autopsy photographs or the Hitler remark] or their combined effect contributed to the jury's decision. The state's evidence in this case is so compel-ling that the jury returned the only verdict possible." *Id.* at 334. Noticeably absent from the Fourth District's opinion is any reference to Petitioner's theory regarding the pinched brake line causing the accident. The Fourth District's failure to reject Petitioner's theory of causation or even acknowledge Petitioner's theory in its opinion coupled with the Fourth District's conclusion that the evidence against Petitioner was "compelling," can only lead this Court to conclude the Fourth District considered the defense theory as unviable as a matter of law. However, this conclusion is belied by the record which contains competent and substantial evidence that the accident might have been caused by a damaged brake line.

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The standard for reviewing a claim of prosecutorial misconduct in a habeas corpus case is whether the prosecutor's actions are of such a nature as to render the trial so fundamentally unfair as to deny the defendant due process. *See Donnelly v. De Christoforo*, 416 U.S. 637, 645 (1974); *Cargill v. Turpin*, 120 F.3d 1366, 1379 (11th Cir. 1997); *Harris v. Moore*, 1999 WL 223167 (M.D. Fla. Feb 19, 1999), *aff'd by*, 212 F.3d 599 (11th Cir. 2000) (Table); *United States v. Young*, 1997 WL 394903 (M.D. Fla. June 16, 1997).

Generally, courts do not analyze whether a particular comment or action is unconstitutional unless the conduct violates an expressly enumerated right. *See Davis v. Zant*, 36 F.3d 1538, 1546 (11th Cir.1994) (citing *Donnelly*, 416 U.S. at 643; *Brooks v. Kemp*, 762 F.2d 1383, 1400 (11th Cir. 1985)). Rather, a court should determine whether a prosecutor's remark, series of remarks, or actions, in the context of the entire trial, rendered the trial unfair. *See id.* "[T]he standard for reviewing prosecutorial misconduct requires a weighing of the nature and scope of the instances of misconduct against the evidence of guilt against the accused." *Id.* In order to overturn a defendant's conviction, the court must determine that "the cumulative errors at trial could be said to have, in reasonable probability, changed the result at trial." *Id.*; *see United States v. Preciado-Cordobas*, 981 F.2d 1206, 1215 n.8 (Fla.1993) ("cumulative effect of several errors that are harmless by themselves could so prejudice the defendant's right to a fair trial that a new trial might be necessary"). "Reasonable probability" means that the errors and misconduct at trial were sufficient to undermine confidence in the outcome. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984).

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Different factors have been developed to determine whether there is a reasonable probability that cumulative error could have changed the result at trial. *See Davis v. Zant*, 36 F.3d at 1546. These factors include as follows: (1) the degree to which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused. *See id.* (citing *Brooks*, 762 F.2d at 1402; *Walker v. Davis*, 840 F.2d 834, 838 (11th Cir.1988)). Thus, where the evidence against the defendant is very strong, in order to merit relief, prosecutorial misconduct would have to be even more egregious and pervasive than in cases where the evidence is less compelling, e.g., where the defendant has a viable defense. *See id.*

## B. *ALLEGED INSTANCES OF PROSECUTORIAL MISCONDUCT*

### 1. *July view of the accident vehicles*

Petitioner contends that the prosecutors "deliberately distort[ed] the condition of the crashed vehicle during [the] jury view." (Amend. Pet. at 7.) Petitioner accuses the State of tampering with Petitioner's wrecked Honda Civic during the jury view of the vehicle at trial, so that the right rear tire bent inward. *See id.* Respondent denies tampering with the vehicles, and states that Petitioner presents no evidence of such misconduct. (Response at 16.)

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Before the jury was permitted to view the wrecked vehicle, the car had been towed from place to place a total of three times. (Tr. 832-833, 836.) There was both testimonial and physical evidence that the vehicle was not in the same condition as it was immediately following the accident. (Tr. 1127-1128, 1131-1132; Def. Ex. 1, 11.)

At trial, Petitioner moved the court to instruct the jury with respect to any differences in the appearance of Petitioner's vehicle between the time immediately following the crash and the time of trial, specifically asking for an instruction with respect to the right rear tire area. (Tr. 627-630.) At the time of the jury view, Petitioner objected to the fact that the right rear tire of Petitioner's car was not in the same condition as the night of the accident, as evidenced by a photograph labeled "6G," and accused the prosecutors of conducting a "fraud and deception." (Tr. 821-823.) The trial court denied Petitioner's objection, but specifically instructed the jury that "[t]hese vehicles are not in the same state and condition that they were in immediately after the collision" because of fire and rescue efforts, as well as extensive towing. (Tr. 836.) The trial court went on to encourage the jury to compare the live wreckage to photographs of the vehicles taken immediately following the accident in order to note that the vehicles' conditions had changed. (Tr. 836-837.) In fact, the trial court passed around to the jury the State's photographic evidence of the crashed cars, specifically calling their attention to photograph 6G of Petitioner's right rear tire, immediately before the jury went outside to view the wreckage. (Tr. 836-837.)

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Although the jury view of Petitioner's vehicle at trial did not provide an accurate representation of the vehicle as it was immediately after the accident, there is no evidence that the State deliberately tampered with the vehicle. Accordingly, Petitioner's argument of prosecutorial misconduct as to the jury view is without merit.

2. *State's statement toward Petitioner. "Is this a joke, sir?"*

During the State's direct examination of front seat passenger David Grossman, ASA Penalta turned to Petitioner in open court in front of the jury and stated, "Is this a joke, sir?" (Tr. 906.) The statement was made as Petitioner stood at ASA Penalta's request, to allow Mr. Grossman to identify Petitioner as the driver of the Honda Civic on the night of the crash. (Tr. 906.) Neither at the time of the comment nor later was any curative instruction given by the trial court, and the trial judge merely stated, "Mr. Penalta . . . Move on." (Tr. 906-907.) ASA Roberts later explained to the trial court that ASA Penalta made the comment because "the Defendant stood up, spread his arms out, moved his arms and smiled."[5] (Tr. 1056-1057.)

Petitioner argues that ASA Penalta's comment violated Petitioner's Fifth Amendment right to remain silent by improperly commenting on his choice not to testify at trial. (Amend. Pet. at 7-8.) The State denies that the comment violated Petitioner's Fifth Amendment right, and argues that Petitioner failed to contemporaneously object. (Response at 15.)

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5. The State admitted at trial that the comment was directed at Petitioner. (Tr. 1056-1057.)

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It is well established that a prosecutor may not comment upon the defendant's decision to exercise his Fifth Amendment right not to testify on his own behalf. *See Doyle v. Ohio*, 426 U.S. 610 (1976); *Griffin v. California*, 380 U.S. 609 (1965). The standard for determining whether a prosecutor has impermissibly commented upon a defendant's right not to testify is "whether or not the statement was manifestly intended or was of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Calderon*, 127 F.3d 1314,1338 (11th Cir. 1997) (citing *United States v. Watson*, 866 F.2d 381, 386 (11th Cir. 1989)).

ASA Penalta's comment was made during the prosecution's case in chief, before anyone knew whether or not Petitioner would take the stand, thus making it unlikely that the prosecutor intended to comment upon Petitioner's then unknown decision not to testify. Further, the jury did not likely "naturally and necessarily" take the comment as an invitation to consider Petitioner's silence, for the nature of the statement did not expressly or impliedly suggest silence is evidence of guilt. Thus, this Court finds that the "Is this a joke, sir?" statement was not "manifestly intended or . . . of such character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify," as to violate Petitioner's right to remain silent.

Although not constitutionally improper, ASA Penalta's comment specifically called the jury's attention to the defendant's off-the-stand behavior or demeanor, which is irrelevant to its task of determining his guilt or innocence.

*See United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984) (prosecutor's comment in closing argument that defendant was acting nervously at the defense table at trial was improper); *United States v. Wright*, 489 F.2d 1181, 1186 (D.C. Cir. 1973) (prosecutor's comment that defendant found the trial "humorous," and prosecutor's instruction to jury that they could consider such demeanor as evidence of guilt, was improper). In addition, such a comment was inflammatory by conveying an impression to the jury that the Petitioner considered the proceedings to be humorous and inconsequential. The jury, which may or may not have observed Petitioner's behavior at the time, was surely left with the impression that Petitioner was laughing at the proceedings. Accordingly, this Court finds that the "is this a joke, sir?" comment directed at Petitioner in front of the jury was clearly improper.

3. *Respondent's referral to Petitioner as "young Mr. Hitler" during closing argument*

Petitioner asserts that ASA Robert's reference to him as "young Mr. Hitler" during closing argument constitutes a violation of his Fifth Amendment right to due process of law. (Amend. Pet. at 7-8.) Respondent admits the comment was inappropriate, but argues that it does not constitute reversible error. (Response at 19-20.)

In her closing argument, ASA Roberts referred to Petitioner as "young Mr. Hitler." (Tr. 1382.) After a defense motion for mistrial was denied without comment, the trial court instructed ASA Roberts to apologize. (Tr. 1383.) ASA Roberts then stated to the jury, "1 have been asked to

apologize, ladies and gentlemen, and I will for the comment that I made but it —." *Id.* The trial judge then instructed the jury as follows, "Ladies and gentlemen, you will please, I am instructing you, you will disregard the last comment before the apology of the prosecutor. Please continue." (Tr.1383.)

The "sole purpose of closing argument is to assist the jury in analyzing, evaluating and applying the evidence." *United States v. Dorr*, 636 F.2d 117, 120 (5th Cir. 1981); *see also United States v. Iglesias*, 915 F.2d 1524, 1529 (11th Cir. 1990). It is therefore impermissible for a prosecutor to "make an argument directed to passions or prejudices of the jurors instead of an understanding of the facts and law." *United States v. Tisdale*, 817 F.2d 1552,1556 (11th Cir.1987) (per curiam). It is similarly improper for a prosecutor's closing remarks to be "calculated to inflame [the] jury," *United States v. Hands*, 184 F.3d 1322, 1333 (11th Cir. 1999) (citing *United States v. Boyd*, 131 F.3d 951, 955 n.4 (11th Cir. 1997)), or to "persuade the jurors to render a decision based on their emotional response to [the defendant's] behavior, rather than the evidence introduced at trial." *Id.*

A number of other courts have examined closing arguments in which a prosecutor has compared the defendant to a universally hated historical figure. These cases turn upon the factual circumstances of the particular comments, thus providing only anecdotal guidance with respect to the comparison here of Petitioner and Hitler. *See e.g.*, *Shurn v. Delo*, 177 F.3d 662, 666-67 (8th Cir. 1999), *cert. denied*, __U.S. __,120 S. Ct. 510 (1999) (comparison of the defendant to Charles Manson requires reversal and new trial); *Martin v.*

*Parker*, 11 F.3d 613 (6th Cir. 1994) (prosecutor's extensive comparison of defendant to Adolf Hitler requires reversal); *United States v. Steinkoetter*, 633 F.2d 719 (6th Cir. 1980) (prosecutor's comparison in closing argument of the defendant to Pontius Pilate and Judas Iscariat required reversal); *State v. Maybin*, 2 P. 3d 179, 183 (Kan. Ct. App. 2000) (finding that prosecutor's reference to the defendant as a "predator" during closing remarks is prosecutorial misconduct because the word is designed to inflame the passion and prejudice of the fact finder); *State v. Roberts*, 1999 WL 543835 (Wash. Ct. App. July 27, 1999) (unpublished opinion) (comparison of defendant to Adolf Hitler, combined with discussion of the latter's dishonesty and aggressive warfare, required reversal).

ASA Roberts' reference to Petitioner as "young Mr. Hitler," was indisputedly improper. Adolph Hitler is recognized as one of the most hated figures in contemporary times. Accordingly, this reference could only serve as to interject emotion, passion, and prejudice against the Petitioner. The comment was obviously intended to demonize Petitioner in the eyes of the jury, thus inviting the jury to decide his guilt or innocence based on passion and facts not in evidence. Thus, this Court finds that the prosecutor's reference to Petitioner as "young Mr. Hitler" was improper.

4. *Admission of autopsy photographs into evidence*

Petitioner contends that the admission of certain autopsy photographs at trial violated his right to due process of law. (Amend. Pet. at 8.) Respondent admits that admission of the pictures was error, but asserts that their admission "played a very minor role" in the State's case. (Reply at 18-19.)

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While gruesome photographs are often admissible to prove a fact at issue, the admission of the accident victims' autopsy photographs in this case was improper because they were irrelevant and "served no purpose other than to highlight the horror of their injuries and deaths." *Copertino v. State*, 726 So. 2d at 334; *see also Ferrier v. Duckworth*, 902 F.2d 545, 548 (7th Cir. 1990) (where identity and cause of death are not at issue, the "only conceivable reason for placing [autopsy photos] in evidence was to inflame the jury against [the defendant]").

First, this has Court reviewed the autopsy photographs entered into evidence at trial and finds that the autopsy photographs arc indeed gruesome and inflammatory. The victims in this case were young in age. Further, the photographs depict the bloodied and road-scraped heads of the victims, including open head wounds. The photograph of victim Ryan Rashidian is particularly inflammatory, for it shows that the skin on that victim's right shoulder and arm have been ripped away from his body and depicts a tracheotomy tube running from a hole in his neck.

Second, the display of the photographs came after ASA Roberts refused, despite numerous offers from defense counsel and the suggestion of the trial court, to stipulate to the identity of the victims so as to avoid the admission of the autopsy photographs. (Tr. 22-23, 610-618, 619-621, 625.) The trial court expressed concern with the introduction of the autopsy photographs, stating that there was no issue as to the identity of the victims because Petitioner had agreed to stipulate to their identities. (Tr. 22-23, 611-612.) Although the autopsy photographs were used at trial by the State's medical examiner witnesses to assist their testimony as to

cause of death, this Court finds no discussion in the record with respect to that issue being a reason to allow the pictures into evidence. Rather, all discussion between counsel and the trial court about whether to admit the photographs focused on whether the State would stipulate to the identity of the victims. Nor does the State now argue that cause of death was a contested issue at trial that required the autopsy photographs be admitted. This Court agrees with the Fourth District that these photographs were irrelevant to any issue at trial. ASA Roberts admitted that she had other non-autopsy photographs of the victims she could use as well, (Tr. 26, 612, 614), and stated, "I won't accept a stipulation." (Tr. 617.) ASA Roberts then admitted on the record that her insistence upon admitting the autopsy photographs was "blackmail" meant to force Petitioner to stipulate to a video simulating a Honda Civic with nine people inside. (Tr. 613.) "Yes, it is blackmail," ASA Roberts stated, "It is pictures of the car or else pictures of five dead children." (Tr. 613) The trial judge then ruled that the autopsy pictures were admissible, with the exception of the photograph of Crystal Cordes, which the judge deemed too prejudicial and likely to inflame the jury. (Tr. 615-616.) ASA Roberts later again refused a final offer by Petitioner to stipulate to the victims' identities, (Tr. 615), and thereafter resisted another suggestion by the trial court that she so stipulate. (Tr. 639.) In the end, it was ASA Roberts' insistence upon admitting the pictures, and the trial court's erroneous ruling, that ensured their admission into evidence and display for the jury.

Finally, the manner in which the autopsy photographs were presented to the jury during closing argument was clearly improper. Although the parties had been previously

warned by the trial court, "Don't go beyond the podium or toward the jury [during closing argument]," ASA Roberts laid the autopsy photographs of the victims upon the jury rail during the final minutes of closing rebuttal argument and invited the jurors to "meet," by name, the deceased victims of the crash.[6] (Tr. 1295, 1400-1401, 1461.) ASA Roberts also apologized to the families at the time, presumably for requiring them to again see their children's autopsy photographs displayed in court. (Tr. 1401.) Meanwhile, "the mothers of the deceased teenagers began wailing at the top of their lungs," (Amend. Pet. at 8), and display of the photographs caused some jurors to begin crying as well. (Reply at 9). This manner of introduction of these pictures was unfairly prejudicial — the photographs of dead, bloodied children being laid within inches of the jury while the prosecutor names each victim amid the cries of their mothers from the gallery. Thus not only were the photographs themselves unfairly prejudicial because neither cause of death nor identity was at issue in the case, but the manner and context in which the photos were displayed for the jury was itself inflammatory and prejudicial.

The prosecution's persistent and improper interjection of sympathy and passion into Petitioner's trial made the introduction of these gruesome photographs even more

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6. The trial record, of course, cannot reflect the physical actions of attorneys, witnesses, or spectators. Therefore, this Court's findings with respect to ASA Roberts' placement of the autopsy photographs upon the jury rail, as well as findings with respect to the behavior and appearance of spectators during the trial, is derived from Petitioner's counsel's statements on the record describing such events. Defense counsel's descriptions of these events are not refuted by the State, and are supported by the relevant passages in the record.

prejudicial. It is improper for a prosecutor to interject sympathy and emotion into a criminal trial, or to take action calculated to inflame the jury. *See, e.g., Tisdale*, 817 F.2d at 1556; *United States v. Beasley*, 2 F.3d 1551,1560 (11th Cir. 1993). As noted by the Fourth District, "[ASA Roberts] engaged in conduct throughout the trial suggesting too much a personal interest in winning, rather than detached advocacy for the state." *Copertino*, 726 So. 2d at 334 n.2. Accordingly, this Court finds that the trial courts admission of the autopsy photographs coupled with the manner in which the ASA utilized such photographs during the final minutes of closing rebuttal argument was improper and highly prejudicial to Petitioner.

## C. *WHETHER THE PROSECUTOR'S ACTIONS ARE OF SUCH A NATURE AS TO RENDER THE TRIAL SO FUNDAMENTALLY UNFAIR AS TO DENY THE DEFENDANT DUE PROCESS*

Since this Court finds that the State committed prosecutorial misconduct by stating to Petitioner during an in-court eye-witness identification, "Is this a joke, sir?"; calling Petitioner "young Mr. Hitler" during closing argument; and presenting autopsy photographs of four of the deceased crash victims in a highly inflammatory manner during closing rebuttal argument, this Court must now determine whether the cumulative effect of this misconduct rendered the trial fundamentally unfair. *See Donnelly*, 416 U.S. at 645 (1974). To determine whether there is a reasonable probability that the prosecutorial misconduct cumulatively could have changed the result at trial, this Court will examine the following factors as set forth by the Eleventh Circuit: (1) the degree to

which the challenged remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether they are isolated or extensive; (3) whether they were deliberately or accidentally placed before the jury; and (4) the strength of the competent proof to establish the guilt of the accused. *See Davis v. Zant*, 36 F.3d at 1546.

1. *Whether the Prosecutors' Improper Remarks and Actions Had a Tendency to Mislead the Jury and Prejudice Petitioner*

The three instances of prosecutorial misconduct made in the presence of the jury during Petitioner's trial. Further, ASA Penalta's rhetorical question, "Is this a joke, sir?," surely led the jury to believe that Petitioner was laughing at the proceedings against him, or otherwise not taking his manslaughter trial and the deaths of the teenaged victims seriously. Those jurors who were not watching Petitioner at the defense table in the seconds preceding this comment would likely draw such an unflattering conclusion, for Petitioner was unable to respond to the accusation. Moreover, ASA Roberts' referral to Petitioner as "young Mr. Hitler" in closing argument was very likely to inflame and mislead the jury. Jurors could easily assume that ASA Roberts was comparing Petitioner to Hitler because she had independent evidence not admitted at trial of his similarity to Hitler. Finally, the manner in which ASA Roberts used the autopsy photographs of the victims in the final moments of closing argument was highly inflammatory and severely prejudiced Petitioner. Accordingly, this Court finds that these three instances of

prosecutorial misconduct, especially the use the autopsy photographs, mislead the jury and prejudiced the Petitioner.[7]

2. *Whether the prosecutors' improper remarks and actions were isolated*

A review of the record shows that the misconduct of the prosecutors was not isolated to the three instances objected to in Petitioner's Amended Petition. In fact, the State engaged in numerous instances of misconduct which prior to trial and continued to engage in such conduct till the end of closing rebuttal argument. These instances evidence the State's intent to interject passion and emotion into Petitioner's trial.

Before the trial began, ASA Roberts made an improper pre-trial statement to the press that Petitioner was driving "like a maniac." *Copertino*, 726 So. 2d at 334, n. 1; (Tr. 305.)

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7. Other prejudicial events occurred during the trial. Although there is no evidence that the prosecutors were responsible for these instances, these instances had an inflammatory effect on the jury and cannot be disregarded when examining whether the trial in its entirety was fundamentally fair. First, Petitioner's father testified that one potential juror leaned over and spoke to a victim's family member sitting on a bench outside the courtroom. (Tr. 286.) During the trial, friends and/or relatives of the deceased victims were observed in the courtroom gallery wearing T-shirts that read "We miss [name of victim]" and bore a picture of the victim. (Tr. 1454-1455.) However, it is unclear from the record for how many days spectators wore such garments. Finally, there were also incidents in the courtroom in which members of the gallery made public outbursts in front of the jury, including an outburst during cross-examination of Emily Slosberg. (Tr. 778). In a addition, Ms. Rettig yelled, "That's a lie. That's a lie," during Petitioner's closing argument, and then ran crying from the courtroom. (Tr. 1336, 1488, 1516.)

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In addition, ASA Penalta admitted on the record that he had personally escorted potential jurors out of the court house and across the street during a break. (Tr. 284-285.) ASA Roberts admitted that when she was leaving her office on her way home from court,. she approached a potential juror asked him if he was okay and offered him a ride home. (Tr. 288-289.)

ASA Roberts refused to accept any stipulation, and stated on the record during discussions with the trial court on this issue that it was her intention to use the pictures to "blackmail" Petitioner into stipulating to the admission of a videotape simulating nine persons in a Honda Civic. (Tr. 613, 617.) "Yes, it is blackmail," ASA Roberts stated, "It is pictures of the car or else pictures of five dead children." (Tr. 613, 617.)

During closing arguments, ASA Roberts commented on scene of the accident, the Palmetto Park Road, noting that the road was not "a race track," but was a "highway used by all of us." (Tr. 1305.) Also, during closing argument, ASA Roberts also made numerous references to the deceased as the "children," "those cute little girls," or "innocent child." (Tr. 1303, 1304, 1310, 1314, 1379, 1382, 1383, 1401.) Moreover, ASA Roberts argued during closing statements that there was no evidence to prove that Petitioner had not been drinking on the night of the accident. (Tr. 1398-1399.)

These further examples of prosecutorial conduct show, that ASA Penalta's question to Petitioner, "Is this a joke, sir?", ASA Robert's reference to Petitioner as "young Mr. Hitler," and ASA Roberts' improper and highly prejudicial use of the autopsy photographs during closing argument, were not isolated instances of improper behavior of the State

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3. *Whether the prosecutors' improper remarks and actions were deliberate, not accidental*

Considering the numerous and continuous instances of misconduct, this Court cannot find that the prosecutors' actions were accidental, Although this Court might find that ASA Penalta's question to Petitioner, "Is this a joke, sir?" might be considered accidental if it were an isolated instance, the misconduct by ASA Roberts cannot be afforded such deference. ASA Roberts deliberately intended to vilify Petitioner during her closing argument by referring to him as "young Mr. Hitler."

Moreover, ASA Roberts use of the autopsy photos was clearly calculated to improperly invoke the sympathy and passions of the jury. Petitioner offered on no fewer than five occasions to stipulate to the identity of the deceased victims, yet the State repeatedly and steadfastly insisted upon admitting the photographs into evidence. (Tr. 22-23, 611-612, 612, 614, 615-616, 617, 639.) ASA Roberts even stated, on the record, that her purpose in insisting upon their admission was not to satisfy any burden of the State, but rather to "blackmail" Petitioner into withdrawing his objection to unrelated evidence. (Tr. 613.) ASA Roberts' deliberateness with respect to the erroneous admission of these photographs is most clearly shown by the manner in which she, in disregard for the trial court's admonition not to approach the jury, laid the pictures upon the jury rail and invited the jurors to "meet" each victim by name. (Tr. 1400-1401.) This dramatic display occurred during the final moments of closing rebuttal

argument leaving the jurors with inflammatory images before they began deliberations. Considering the trial as a whole, this Court finds that the conduct by the prosecutors was deliberate.

4. *Whether the State's evidence against Petitioner at trial was adequate for conviction, but not overwhelming*

"An error may substantially influence an outcome and thus warrant reversal even if the evidence, had no error occurred, would have been sufficient to support the conviction." *Hands,* 184 F.3d at 1329 (citing *United States v. Marshall*, 173 F.3d 1312, 1318 & n. 15 (11th Cir. 1999)). Where the evidence against the defendant is very strong, in order to merit relief, prosecutorial misconduct would have to be even more egregious and pervasive than in cases where the evidence is less compelling, e.g., where the defendant has a viable defense. *See Davis v. Zant*, 36 F.3d at 1546. Although the State presented evidence at trial that was adequate to support a conviction, this evidence was not overwhelming.

In order to convict Petitioner at trial, the State had to prove beyond a reasonable doubt that "[Petitioner's] conduct was of such a flagrant character as to evince reckless disregard of human life or the safety of persons exposed to its dangerous effects." *Russ v. State*, 191 So. 296, 299 (1939). Moreover, "every case of manslaughter by culpable negligence must be determined upon the facts and circumstances peculiar to that case." *Filmon v. State*, 336 So. 2d 586, 590 (Fla. 1976) (excessive speed through red light while changing lanes at dusk sufficient to convict); *See* also *Russ*, 191 So. at 299 (excessive speed in heavy traffic not sufficient to convict);

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*Davidson v. State*, 688 So. 2d 338, 340 (Fla. 1st DCA 1997) (excessive speed on unlit, curvy, unfamiliar road at night, where driver consumed alcohol and had just completed sixteen-hour work shift, sufficient to convict); *Behn v. State*, 621 So. 2d 534, 535-36 (Fla. 1st DCA 1993) (running a red light while knowingly driving tractor trailer with inoperable brakes insufficient to convict); *Ellison v. State*, 547 So. 2d 1003,1005 (Fla. 1st DCA 1989) (excessive speed while evading police, weaving among heavy traffic, crashing through closed toll gate, and intentionally crossing median sufficient to convict); *Brown v. State*, 511 So. 2d 1116, 1117 (Fla. 2nd DCA 1987) (speeding ten to thirty miles per hour over the limit down a four lane residential road during daylight hours insufficient to convict); *Peel v. State*, 291 So. 2d 226, 227 (Fla. 1st DCA 1974) (where driver, after consuming alcohol, ran through stop sign and attempted a turn without slowing evidence was insufficient to convict); *Phillips v. State*, 289 So. 2d 769, 771 (Fla. 2nd DCA 1974) (driving homemade drag racing vehicle on wet public street while intoxicated sufficient to convict); *Day v. State*, 154 So. 2d 340, 341-43 (Fla. 2nd DCA 1963) (driving during the day at an allegedly high rate of speed after drinking insufficient to convict); *Penton v. State*, 114 So. 2d 381, 382-83 (Fla. 2nd DCA 1959) (where speeding and severely intoxicated driver struck young pedestrian, dragged his body until dislodged from vehicle, then continued driving, evidence was sufficient to convict).

In denying Petitioner's state appeal, the Fourth District stated that "mere speed greater than the lawful limit does not ordinarily by itself demonstrate the kind of gross, wanton and wilful conduct equated with a reckless disregard for

human life or safety that is necessary to establish culpable negligence." *Copertino*, 726 So. 2d at 332. However, while excessive speed alone may not constitute such reckless disregard, "the rate of speed of a vehicle can be firmly shown by the evidence to be so excessive under the circumstances that to travel that fast under the conditions is by itself a reckless disregard for human life or the safety of persons exposed to the speed." *Id.* Thus, the jury had to find beyond a reasonable doubt that Petitioner's speed, in conjunction with the circumstances surrounding his travels, demonstrated a reckless disregard for human life or the safety of those in his vehicle or on the road.

The evidence presented at trial supported both the State's theory of extremely reckless action by Petitioner and Petitioner's theory of defense that on object from the road pinched his right rear brake line, causing him to lose control of his vehicle and ultimately crash. Ultimately, the evidence against Petitioner was not overwhelming. Rather a jury considering the evidence without the emotion and passion interjected by the State could have decided this case either way.

The State presented evidence at trial that Petitioner was traveling at a rate of speed of approximately ninety (90) miles per hour. (Tr. 548.) The State also presented eyewitness testimony characterizing Petitioner's driving as "wild," and describing how he was tailgating and weaving among traffic. (Tr. 683-684, 735, 737, 789.) To rebut Petitioner's claim that a pinched brake line caused the accident, Sergeant Altieri testified that skid marks showed Petitioner had "a hundred percent braking capacity," meaning four working brakes at

the time of the crash, and that he found no evidence of any object in the road besides crash debris. (Tr. 473, 560-561.) The other witness called to rebut Petitioner's brake line theory, Corporal Borman, was unconvincing at best, for he did not inspect the vehicle until the time of trial (after it had been repeatedly towed), admitted that he could not describe the brake line's post-accident condition, and admitted that he was not an expert in brake line analysis. (Tr. 1218,1225.) The State also contended that the weight of the seven back seat passengers caused Petitioner's Honda to spin, but could present no evidence at trial to support that claim. (Tr. 548-550, 556, 881.) Certain circumstances surrounding the scene also support the State's position that Petitioner was driving recklessly, such as the fact that it was nighttime, Palmetto Park Road was not well lighted at that time, and Petitioner was driving with seven un-belted passengers in the back seat of a relatively small vehicle. (Tr. 444, 481, 731.)

Petitioner presented credible evidence and expert testimony in support of his contention that a pinched brake line, not erratic driving, caused this accident. Defense Exhibit 1 which depicts the area surrounding Petitioner's right rear tire appears to show that an object has punctured the right rear brake line. One can clearly see that the hard yellow coating is ripped away, revealing a torn inner black tube. Petitioner had two experts, Dr. Waddleworth and Mr. Alfonso, testify at trial that this damage to the brake line caused the right rear brake to remain locked when the others were released and ultimately led to Petitioner's vehicle to go into a high-speed spin. (Tr. 1077, 1085-1087, 1087-1088, 1110-1111, 1126, 1126-1129, 1130-1131, 1138-1142.) Mr. Alfonso stated that compression from the accident could

not have caused the damage to the brake line, and that his inspection showed no evidence of the damage coming from impact with the nearby shock absorber. (Tr. 1129, 1143-1144.) Petitioner presented other evidence to support this theory that road debris pinched his brake line, such as testimony from passengers Grossman and Slosberg that he yelled, "Help!" while looking over his right shoulder just before the accident and one witness's description of an object in the road short of the crash scene. (Tr. 677-680, 751-752, 754, 784, 883-884, 887, 888, 892.) Dr. Waddleworth also rebutted the State's contention that the weight of the passengers caused the car's rotation, as did Mr. Grossman. (Tr. 893, 1088-1090.) Mr. Grossman testified that Petitioner's ability to drive the car was not inhibited by the number or weight of persons in the vehicle. (Tr. 881.)

Petitioner also presented evidence to rebut the State's contention that he was driving wildly before the crash. Eyewitness Dr. Phyllis Jonas testified that Petitioner did not exhibit any erratic driving behavior other than his speed, and front seat passenger David Grossman testified that Petitioner's driving was normal up until the time of the accident. (Tr. 675, 885, 911.) In addition there was evidence that the weather was clear, traffic was only moderate, the road was straight and wide, and Petitioner had not been drinking. (Tr. 453-457, 468, 469, 482, 682, 689, 951-961.)

The testimony of accident survivor Emily Slosberg is demonstrative of how the jury could have interpreted certain evidence at trial as both favoring and undermining Petitioner's case. Ms. Slosberg, who was a backseat passenger in Petitioner's vehicle, gave a sworn statement to a state trooper

near the time of the crash stating that Petitioner's driving was "fine until just before the accident." (Tr. 748, 757-764, 789.) She then changed her testimony at trial, stating that Petitioner was driving "wild," "very fast," and "too fast," while "swerving" and almost hitting another car. (Tr. 748, 757-764, 789.) Unlike Ms. Slosberg, front seat passenger David Grossman gave consistent sworn statements both immediately after the accident and at trial, both stating that Petitioner was driving normally. (Tr. 885, 908, 911.) Since both witnesses' credibility could be questioned, Grossman was a friend of Petitioner's and Slosberg's twin sister was killed in the crash, a jury could well have decided to believe Mr. Grossman's consistent statements rather than Ms. Slosberg's inconsistent testimony.

In light of the competent and substantial evidence presented by Petitioner at trial showing that the accident may have been caused by the pinching of his right rear brake line by an object in the roadway, this Court cannot say that the State's evidence against Petitioner was so overwhelming or compelling.

## CONCLUSION

Considering the foregoing, this Court's confidence in the outcome of Petitioner's trial is underlined by the State's continuous and deliberate course of misconduct. This Court finds that there is a reasonable probability that the outcome would have been different had this misconduct not occurred. Accordingly, this Court finds that the cumulative effect of the State's misconduct rendered Petitioner's trial fundamentally unfair and that Petitioner's conviction must be overturned.

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## RECOMMENDATION

For the reasons stated above, it is therefore RECOMMENDED that Petitioner's Amended Petition for Writ of Habeas Corpus (DE 12), filed pursuant to 28 U.S.C. § 2254, be GRANTED.

Any party may serve and file written objections to this Report and Recommendation with the Honorable Kenneth L. Ryskamp, within ten (10) days after its receipt. *See* 28 U.S.C. § 636(b)(l)(C). Failure to file timely objections may limit the scope of appellate review of factual findings contained herein. *See United States v. Warren*, 687 F.2d 347, 348 (11th Cir.1982) *cert. denied*, 460 U.S. 1087 (1983).

DONE and RECOMMENDED in Chambers at West Palm Beach in the Northern Division of the Southern District of Florida, this 6 day of September, 2000.

ANN E. VITUNAC
United States Magistrate Judge

**APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITIONER'S MOTIONS FOR REHEARING AND REHEARING EN BANC DATED AND FILED FEBRUARY 4, 2002**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 01-10226 BB

NICHOLAS F. COPERTINO,

Plaintiff-Appellee,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Michael W. Moore, STATE OF FLORIDA,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d ___).

*Appendix D*

Before: HULL, MARCUS and FARRIS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

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* The Honorable Jerome Farris, U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

**APPENDIX E — PER CURIAM OPINION OF THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA DATED AND FILED JANUARY 20, 1999**

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT JANUARY TERM 1999**

CASE NO. 97-2326

NICHOLAS FRANK COPERTINO,

Appellant,

STATE OF FLORIDA,

Appellee.

Opinion filed January 20, 1999

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County, Roger B. Colton, Judge, L.T. Case No. 96-4398-CFA02.

PER CURIAM.

Defendant appeals his conviction for five counts of manslaughter by culpable negligence and six counts of culpable negligence. We affirm.

Defendant's principal argument in favor of a judgment of acquittal is that, because speed alone is insufficient to convict of manslaughter by culpable negligence, the trial

judge should have taken this case from the jury. He relies on text in *Filmon v. State*, 336 So.2d 586, 590 (Fla. 1976). In *Filmon*, we note, there was actually much more for the jury to chew on than mere speed and drinking, so the case does not necessarily stand for the proposition. Actually the idea appears to have originated in *Russ v. State*, 140 Fla. 217, 191 So. 296 (1939), where the holding of the court was slightly different. The court said:

> "The state contended that the excessive rate of speed of the car at the time of the collision was sufficient to bring the case within the rule [that the state must show that defendant's conduct was "of such a flagrant character as to evince reckless disregard of human life or the safety of persons exposed to its dangerous effects"]. We cannot agree to this contention *in the light of all the evidence in the record.*" [e.s.]

191 So. at 299. As the court explained:

> "The gravamen of the charge here is that the car at the time of the accident was being driven at an excessive rate of speed. The evidence is conflicting as to the rate of speed traveled at the time of the accident, but is by the witnesses placed at from 25 to 60 miles per hour. The occupants of the car placed it from 25 to 35 miles; one or two witnesses near the scene of the accident estimated it to be from 40 to 50 miles, and others between 50 to 60. It is argued by the State that the excessive

> rate of speed at the time of the accident is fully established by the distance the car traveled before stopping after the collision."

191 So. at 299. In reversing the conviction, the *Russ* court determined that, taking as true all of the state's evidence as to the defendant's operation of the vehicle, the entire evidence simply did not rise to a level evincing reckless disregard for human life or the safety of persons exposed to its effects. At bottom, the court seems to have determined as a matter of law that the victim's negligence in darting into the highway under the circumstances was the major cause of the accident. Hence the speed of defendant's vehicle, even if in excess of the limit, did not seem to play so important a role in the court's determination as did the conduct of the deceased.

We think that the real rule gleaned from the cases is that mere speed greater than the lawful limit does not ordinarily by itself demonstrate the kind of gross, wanton and wilful conduct equated with a reckless disregard for human life or safety that is necessary to establish culpable negligence. In *Russ* the speed limit is not stated, and the evidence differed widely as to the rate of speed traveled, ranging from 20 to 60 mph. Merely driving 5 mph over the limit, for example, is unlikely to evidence the depraved kind of conduct necessary for culpable negligence. And so there is support in *Russ* for the notion that driving 50 mph in a 45 mph zone would not establish reckless disregard for human life in most circumstances.

For this crime of manslaughter by culpable negligence, however, it is one thing to speed slightly over the posted

limit, and it is quite another matter to drive at such an immensely excessive rate that no one could reasonably drive. In our opinion, the rate of speed of a vehicle can be firmly shown by the evidence to be *so* excessive under the circumstances that to travel that fast under the conditions is by itself a reckless disregard for human life or the safety of persons exposed to the speed. For example, while driving 90 mph at Sebring on a test track might not even be negligent conduct, racing at 90 mph in front of school where children are entering or leaving would surely be so flagrant as to show a reckless disregard for human life and safety. This case is of the latter kind. This defendant drove his vehicle at an enormously excessive speed at a time and in a place where it might have been dangerous to exceed the posted limits by even a little.

The speed was fixed authoritatively by the evidence at *90.41* mph! The place was a major thoroughfare near residential areas in a large metropolitan area. The time was in the late evening, long after sunset, with visibility necessarily reduced. The vehicle was a compact car (Honda Civic) filled with 9 persons, 7 of whom were crammed into the back seat without seatbelts. The driver was young and inexperienced. Driving this fast under these circumstances so logically evinces to us the required reckless disregard for human life or the consequences on the safety of his passengers contemplated by the statute that we frankly cannot see the plausibility of arguing otherwise. As in *Filmon*, we think this evidence is enough to establish culpable negligence manslaughter.

*Appendix E*

Defendant also contends that the trial court erred in failing to grant a change of venue. In carrying out our duty to make an independent evaluation of the circumstances, *see Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966), we conclude that there was no error in trying this case in Palm Beach County. The test for determining whether a change of venue must be granted is:

> "whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and pre-conceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom."

*McCaskill v. State*, 344 So. 2d 1276, 1278 (Fla. 1977); *Rolling v. State*, 695 So. 2d 278, 284 (Fla. 1997). The trial court is required to analyze two factors: "(1) the extent and nature of any pretrial publicity; and (2) the difficulty encountered in actually selecting a jury." *Rolling*, 695 So. 2d at 285 (citing *Murphy v. Florida*, 421 U.S. 794 (1975)).

Of course, as the supreme court has observed, pretrial publicity is a fact of life, readily expected in cases such as this, and by itself does not require a change of venue. *Provenzano v. State*, 497 So. 2d 1177, 1182 (Fla. 1986), *cert. denied*, 481 U.S. 1024 (1987). The essential inquiry is whether prospective jurors can lay aside any impressions arising from pretrial publicity and decide the case alone on the evidence received in court and the law given to them by the trial judge. *McCaskill*, 344 So. 2d at 1278. As the court did in *Rolling*, we consider the five factors relating to the

extent and nature of pretrial publicity in this case and conclude that there is nothing so inflammatory in it to arouse suspicions as to the bias or prejudice of the venire *See Rolling*, 695 So. 2d at 285 ("the trial court must consider numerous factors, such as: (1) the length of time that has passed from the crime to the trial and when, within this time, the publicity occurred; (2) whether the publicity consisted of straight, factual news stories or inflammatory stories; (3) whether the news stories consisted of the police or prosecutor's version of the offense to the exclusion of the defendant's version; (4) the size of the community in question; and (5) whether the defendant exhausted all of his peremptory challenges.") (citations omitted).

Here defendant failed to establish a presumption of partiality because he failed to show from the publicity a general atmosphere deeply hostile to him. *Copeland v. State*, 457 So. 2d 1012, 1016-1017 (Fla. 1984) (*vacated and remanded on other grounds*, *Copeland v. Dugger*, 565 So. 2d 1348 (Fla. 1990)); *see also Murphy*, 421 U.S. at 800-803. The publicity here was "largely factual, rather than emotional, in nature" and took place for the most part close to the time of the event.[1] There was comparatively little

1. We do note that the prosecutor who tried the case for the state was quoted in the press as saying that defendant drove his car "like a maniac and is responsible for killing five people." We deplore such pretrial comments by prosecuting attorneys and caution them that they are subject to sanctions for engaging in this kind of pretrial commentary. In this instance defendant offered little, if any, record support for a finding that the pretrial publicity in its entirety created the requisite kind of general atmosphere of hostility against him that would raise doubts about individual jurors' protestations of impartiality.

difficulty in selecting a jury. The court granted only seven challenges for cause and allotted defendant two additional peremptory strikes, only one of which he actually used. The entire process of selecting the jury was completed within two days. We conclude that no error has been shown in keeping the trial in the county where the crime was said to have occurred.

Defendant also argues that two additional errors require a new trial. First, he contends that it was error for the trial judge to admit autopsy photographs of the victims — which gruesomely depicted the extent of the injuries — when this evidence was irrelevant to any issue in the case. Second, he contends that the prosecutor's characterization of defendant during closing argument as "young Mr. Hitler" was so inflammatory as to require a new trial in spite of the trial judge's admonition to the jury to disregard it.

The admission of the autopsy photographs of the victims served no purpose other than to highlight the horror of their injuries and deaths and was therefore improper. Plainly the prosecutor's "young Mr. Hitler" remark, too, is improper.[2] We understand the human tendency to identify with the victims of such senseless conduct and their families, as in this case where so many young people died. Prosecutors must nevertheless steel themselves against such emotions and direct their energies to presenting the state's case within the law. They are not given the right to voice the same emotions understandably expressed by the families of the victims.

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2. This prosecutor engaged in conduct throughout the trial suggesting too much a personal interest in winning, rather than detached advocacy for the state.

*Appendix E*

Ordinarily it would be difficult for us to find the combined errors of the photos and the Hitler remark to be harmless. But in this case defendant has the burden of showing prejudicial error,[3] rather than the state showing beyond any reasonable doubt that the error was harmless.[4] Given the nature of defendant's conduct — driving 90 mph at night in a metropolitan area with a small car overloaded with passengers — we do not believe that either of these errors or their combined effect contributed to the jury's decision. The state's evidence in this case is so compelling that the jury returned the only verdict possible.

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3. *See* § 924.051(1)(a), Fla. Stat. (1997) (" 'Prejudicial error' means an error in the trial court that harmfully affected the judgment. . . .").

4. *See* § 924.051(7), Fla. Stat. (1997) ("In a direct appeal . . . the party challenging the judgment . . . of the trial court shall have the burden of demonstrating that a prejudicial error occurred in the trial court."); *Chapman v. California*, 386 U.S. 18, 24 (1967); *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986) (in case of constitutional error, state has burden of showing beyond reasonable doubt that error did not contribute to verdict).

FARMER and SHAHOOD, JJ., concur.
DELL, J., concurs specially with opinion.

DELL, J., concurring specially.

I join with the majority in affirming appellant's conviction for five counts of manslaughter by culpable negligence and six counts of culpable negligence. The law is clear that the evidence of speed alone would not be sufficient to sustain his convictions of manslaughter by culpable negligence. However, here the record contains overwhelming evidence that appellant, by the extraordinary conditions under which he operated his vehicle, coupled with the speed of the vehicle, evinced a reckless disregard for human life or the safety of persons exposed to its dangerous effects.

**APPENDIX F — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT GRANTING THE STATE OF FLORIDA'S MOTION TO RETURN COPERTINO TO CUSTODY DATED AND FILED MARCH 27, 2002**

**IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

No. 02-11332-AA

NICHOLAS F. COPERTINO,

Petitioner-Appellee,

versus

SECRETARY FOR THE DEPARTMENT OF CORRECTIONS, Michael W. Moore, STATE OF FLORIDA,

Respondents-Appellants.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: BLACK, HULL and MARCUS, Circuit Judges.

BY THE COURT:

The State of Florida and Michael Moore as Secretary for the Department of Corrections (jointly the "State") have appealed the district court's order, dated February 25, 2002, which permitted Nicholas F. Copertino ("Copertino")

to remain released even though his state criminal convictions have now been affirmed by both the state and federal appellate courts. After review, we reverse and vacate the district court's order. In addition, we grant the State's motion to return Copertino to custody and deny Copertino's motion for a stay of his state sentence.

## I. BACKGROUND

Copertino was convicted of multiple counts of manslaughter and culpable negligence in a Florida state court. The Florida District Court of Appeal affirmed Copertino's convictions, and the Florida Supreme Court denied review. A federal district court granted Copertino's federal habeas corpus petition filed pursuant to 28 U.S.C. § 2254, thereby vacating his convictions. In light of its grant of habeas corpus relief, the federal district court granted Copertino release on bond from state custody. This Court, however, reversed the district court's grant of habeas corpus relief and reinstated Copertino's convictions.

Prior to the issuance of the mandate in the habeas appeal, the State filed a motion to revoke Copertino's release and return him to the custody of the Florida Department of Corrections. On December 27, 2001, this Court denied that motion without prejudice as the petition for rehearing remained pending in this Court and the habeas appeal to this Court was not yet completed. On February 14, 2002, in the same habeas appeal, the State renewed its motion to revoke Copertino's release. This Court denied that renewed motion as moot because the mandate had issued in the habeas appeal

and also directed that any further application for relief first be presented in the district court.[1]

On February 14, 2002, the State immediately filed in the district court a renewed motion to revoke Copertino's release and to return Copertino to the custody of the State of Florida Department of Corrections. On February 15, 2002, Copertino filed an "Omnibus Motion to Stay Execution of a Sentence Pending Certiorari Petition to the United States Supreme Court and Motion for Continued Release Pending Certiorari Petition to the United States Supreme Court." Relying on the standard set forth in 18 U.S.C. § 3143(b)[2],

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1. The district court's original release of Copertino on bond was based on the fact that habeas relief had been granted by the district court and Copertino's convictions were set aside. This Court then reversed and vacated that grant of habeas relief. Once this Court's mandate issued, this reinstated Copertino's state convictions and sentence as a matter of law. Therefore, the State was authorized to return Copertino into custody at that time absent Copertino's obtaining a stay. Nonetheless, given the circumstances of this case, we understand why the State proceeded to seek authority first from the district court to take Copertino into custody. Copertino also then moved in the district court for a stay which was granted.

2. 18 U.S.C. § 3143(b) provides in relevant part as follows:

> (b) **Release or detention pending appeal by the defendant** — (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds —

(Cont'd)

the district court entered an order, dated February 25, 2002, which denied the State's renewed motion and granted Copertino's motions. In that order, the district court allowed Copertino to remain released on the existing bond pending the disposition of his petition for writ of certiorari to the United States Supreme Court seeking review of the denial of his § 2254 habeas petition. The State timely appealed the district court's order.

In addition to its notice of appeal, the State also filed in this Court a motion to revoke release and to return Copertino to the Florida Department of Corrections. In response, Copertino moved this Court for a stay of his state sentence and for continued release pending his filing a petition for writ of certiorari in the United States Supreme Court seeking review of the denial of his § 2254 habeas petition. Copertino also filed a motion to dismiss the State's motion to revoke his release on the ground that the mandate has issued and this Court retains no jurisdiction over the State's motion to revoke Copertino's release.

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(Cont'd)

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in —

(i) reversal,

(ii) an order for a new trial,

. . . .

## II. DISCUSSION

After review, we reverse and vacate the district court's order dated February 25, 2002.[3] The district court utilized the wrong standard because 18 U.S.C. § 3143(b) applies only to criminal proceedings and is inapplicable to collateral attacks of criminal convictions by state prisoners seeking federal habeas relief. *See, e.g., United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994); *Marino v. Vasquez*, 812 F.2d 499, 508 (9th Cir. 1987); *United States v. Kelly*, 790 F.2d 130, 139 (D.C. Cir. 1986); *Cherek v. United States*, 767 F.2d 335, 337 (7th Cir. 1985); *United States ex. rel. Thomas v. New Jersey*, 472 F.2d 735, 741 (3d Cir. 1973).

Instead in this habeas context, this Court has reserved bail or release only for situations where the defendant demonstrates (1) the "likelihood of success on the merits of a substantial constitutional claim," and (2) "extraordinary and exceptional circumstances exist which make the grant of bail necessary to preserve the effectiveness of the habeas corpus relief sought." *Gomez v. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990) (citing *Calley v. Callaway*, 496 F.2d 701, 702 (5th Cir. 1974)); see *Aronson v. May*, 85 S.Ct 3, 5 (1964) (involving an applicant requesting bail pending appeal of the denial of a habeas petition and stating that "[i]n this kind of case it is therefore necessary to inquire whether, in addition to there being substantial questions presented by

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3. The parties debate whether this Court has jurisdiction to entertain original motions by the parties or only to decide the State's appeal. We need not decide this issue because we reach the same result in this case whether through the appeal of the district court's order or by the original motions filed by the parties in this Court.

the appeal, there is some circumstance making this application exceptional and deserving of special treatment in the interests of justice"); *Wilcox v. Ford*, 813 F.2d 1140, 1151 (11th Cir. 1987) ("[I]t is clear that the habeas petitioner who has had a full trial and appeal stands in a very different position from the defendant who has not had a prior determination of his rights . . . [T]he state has a greater interest in maintaining custody of the petitioner").

Applying the correct standard to this case, we conclude that the district court erred in denying the State's motion to revoke Copertino's release and in granting Copertino's motions for stay of his sentence and continued release. First, Copertino has not shown a likelihood of success on the merits of a substantial constitutional claim. As noted in our earlier opinion, the defense did not and could not dispute the compelling evidence of Copertino's culpability: he was driving from 85 to 90 miles per hour in a 50 miles-per-hour zone; the time was late evening, which reduced visibility; the vehicle was a compact car, filled with nine people; none of the backseat passengers wore seatbelts; and Copertino was a young and inexperienced driver who had held a license for less than a year. The state appellate court upheld the conviction because "[d]riving this fast under these circumstances so logically evinces to us that required reckless disregard for human life or the consequences on the safety of his passengers contemplated by the statute that we frankly cannot see the plausibility of arguing otherwise." *Copertino v. State*, 726 So.2d 330, 333 (Fla. Dist. Ct. App. 1999).

When the district court granted habeas relief, it erred by failing to acknowledge an inescapable inference contained in the state appellate court's decision: the jury could accept

the defendant's theory of a pinched brake line and still find him guilty because the defense theory in no way negates the overwhelming and undisputed evidence of Copertino's culpable conduct. The record fails to reflect a denial of due process. There is no reasonable probability that, in the absence of the prosecutor's "young Mr. Hitler" comment, acquittal would have been the result of the jury's deliberations. Moreover, as to that comment, the state trial court immediately made the prosecutor apologize and instructed the jury to disregard the prosecutor's comment. The jury was immediately made aware of the court's position and the offensive nature of the comment.

Second and in any event, no extraordinary or exceptional circumstances exist in this case for a federal district court to release a state prisoner from state custody pending review of the denial of a § 2254 habeas petition. This is especially true in this case when the federal appeal has concluded and the only federal review left is not a right of appeal but discretionary review by the United States Supreme Court. The types of extraordinary circumstances previously recognized include the serious deterioration of a defendant's health while incarcerated and a short sentence for a relatively minor crime so near completion that extraordinary action is essential to make collateral review truly effective. *See Calley*, 496 F.2d at 702 n.1 (listing examples of extraordinary circumstances). None of those circumstances exists in this case.[4]

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4. What standard applies is a question of law we review *de novo*. The decision to grant or deny release from custody is left to the discretion of the district court and is reviewed for abuse of discretion. We conclude the district court not only committed legal error in applying the wrong standard but also abused its discretion in granting Copertino's motions and denying the State's motion.

*Appendix F*

## III. CONCLUSION

In conclusion, this Court reverses and vacates the district court's order dated February 25, 2002.

This Court also grants the State's motion to revoke Copertino's release to the extent that the State may take Copertino into its custody after the expiration of seven (7) days from the date of this Order. We grant these 7 days so that Copertino may resolve his personal affairs. The Court denies the State's request to have the U.S. Marshal take Copertino into custody, and orders that Copertino may voluntarily surrender by noon on April 3, 2002, or if not, the appropriate state officials shall take Copertino into custody at noon on that day. The Court also denies Copertino's motions for stay of execution of his state sentence and for continued release pending certiorari review and denies Copertino's motion to dismiss the State's motion. The Court directs the Clerk to close this appeal instanter.

**REVERSED AND VACATED.**

## APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING PETITIONER'S MOTION FOR CONTINUED RELEASE PENDING CERTIORARI PETITION AND STAYING EXECUTION OF PETITIONER'S SENTENCE DATED AND FILED FEBRUARY 25, 2002

**UNITED STATES DISTRICT COURT**
**FOR SOUTHERN DISTRICT OF FLORIDA**
**WEST PALM BEACH**

Case No. 00-8233-CIV-RYSKAMP/VITUNAC

NICHOLAS F. COPERTINO,

Petitioner,

v.

SECRETARY FOR THE FLORIDA
DEPT. OF CORRECTIONS, et al.,

Respondents.

**ORDER ON MOTION FOR STAY OF EXECUTION OF SENTENCE AND MOTION FOR CONTINUED RELEASE**

THIS CAUSE comes before the Court upon Petitioner's Omnibus Motion for Stay of Execution of Sentence Pending Certiorari Petition (Rule 38 of the Federal Rules of Criminal Procedure) and Motion for Continued Release Pending Certiorari Petition (18 U.S.C. § 3143(b)) **[DE 81]**. The Respondent has moved to revoke bond and return the

Petitioner to custody **[DE 80]**. The Petitioner presently is released pursuant to a personal surety bond with numerous restrictions **[DE 60]** issued pursuant to 18 U.S.C. § 3142(b).

The Eleventh Circuit has reversed this Court's grant of a writ of habeus corpus **[DE 83]** and the Petitioner has indicated his intention to file a petition for writ of certiorari to the Supreme Court of the United States. This Court conducted a hearing on February 25, 2002 and now makes the following findings of fact and conclusions of law.

**18 U.S.C. § 3143(b)(A)**

The Respondent does not contend that the Petitioner poses a danger to the safety of any other person or the community. The Respondent does contend that the Petitioner is likely to flee. The facts indicate that Petitioner has been on a personal security bond for over one year without any adverse incident. Petitioner is in the custody of his family and appears to have no incentive to go elsewhere. The Court finds that the Petitioner has met the conditions of § 3143(b)(A) for the continuance of his bond.

**18 U.S.C. § 3143(b)(B)(ii)**

The issue before this Court is whether the petition for certiorari raises a substantial question of law likely to result in an order for a new trial. At the outset, this Court recognizes that less than 1% of all petitions for certiorari are granted by the Supreme Court. The specific issue in this case is whether rogue prosecutors can purposefully and intentionally inject inflammatory remarks into a criminal trial without suffering

the consequences of mistrial. This issue implicates the due process clause of the federal Constitution. The Eleventh Circuit described the three incidents as "despicable acts of the prosecution." (I would add "unethical, reprehensible, contemptible, and sanctionable" to the description of the acts of the prosecutors.) The state court found the acts of the prosecution team to be improper, and ordinarily these acts would not be considered "harmless error." The court found that these intentional acts were harmless in light of the excessive speed of the Petitioner. *Copertino v. State*, 726 So.2d 330 (Fla. Dist. Ct. App. 4th Dist. 1999).

The message being sent by the Eleventh Circuit is that a prosecutor can say anything or do anything, no matter how "despicable" without consequences if the evidence for conviction is strong enough. (The Eleventh Circuit apparently has attempted to mute this message with an unpublished opinion.) It is puzzling to this Court how the Eleventh Circuit knew that the jury was not influenced by this "despicable" conduct. Did the court experience the dynamics in the courtroom? Was the court present during the jury deliberations?

The potential for inter-circuit conflicts in this case is very real. In *Martin v. Parker*, 11 F.3d 662 (8th Cir. 1999), a state court conviction was vacated when it appeared that in closing argument, the prosecutor compared the defendant to Adolf Hitler. Even state courts find that a prosecutor's comparison of a defendant with Hitler is reversible error. *See State v. Roberts*, 1999 Wash. App. Lexis 1386. The Eighth Circuit also found reversible error when the prosecutor in closing argument compared the defendant with Charles

Manson. *See Shurn v. Delo*, 177 F.3d 662 (8th Cir. 1999), *cert. denied*, __U.S. __, 120 S. Ct. 510 (1999) and *Newton v. Armontrout*, 885 F.2d 1328 (8th Cir. 1989). The Sixth Circuit found reversible error when the prosecutor in closing argument compared the defendant with Pontius Pilate and Judas Iscariot. *See United States v. Steinkoetter*, 633 F.2d 719 (6th Cir. 1980). The Supreme Court may wish to resolve this conflict between the circuits.

At the present time, there is a national dialogue on whether Al-Qaeda and Taliban prisoners can receive a fair trial in a military tribunal. The American Bar Association has gone on record claiming the only way for them to get a fair trial is in federal courts. If a prosecutor in a federal court can identify these prisoners with Hitler, apparently there will be no consequences because the proof of guilt was considerable. I doubt whether a military tribunal would condone such "despicable" prosecutors.

I return to the issue of whether the petitioner raises a substantial issue of law likely to result in an order for a new trial. So far, two federal judges have come down on the side of a new trial and three federal judges have come down on the side of affirmance. I have no way of predicting what nine Supreme Court Justices will do. I do know that historically the Court has expressed concern over due process jurisprudence when the issue was whether a defendant was entitled to an attorney in a state court proceeding. *See Gideon v. Wainwright*, 372 U.S. 335; 83 S. Ct. 792; 9 L. Ed. 2d 799 (1963). Certainly, the Court should be concerned about "despicable" conduct by rogue prosecutors. I find that the petition for writ of certiorari raises a substantial question of

law likely to result in an order for a new trial. I believe the court should adopt a per se rule requiring mistrial or reversal for such conduct. Therefore, it is hereby

ORDERED AND ADJUDGED as follows:

The Petitioner's motions **[DE 81]** are **GRANTED**. The Respondents' Renewed Motion to Revoke Bond and Return Copertino to Custody of the State of Florida Department of Corrections **[DE 80]** is **DENIED**. The Petitioner will remain on bond pending the disposition of the petition for writ of certiorari. Execution of sentence is **STAYED**.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 25 day of February, 2002.

KENNETH L. RYSKAMP
UNITED STATES DISTRICT JUDGE

## APPENDIX H — ORDER OF THE SUPREME COURT OF FLORIDA DENYING REVIEW DATED JUNE 24, 1999

**SUPREME COURT OF FLORIDA**

THURSDAY, JUNE 24, 1999

CASE NO. 95,360

District Court of Appeal, 4th District - No. 97-02326

NICHOLAS FRANK COPERTINO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, WELLS, ANSTEAD, PARITENE and LEWIS, JJ., concur.

*Appendix H*

A True Copy
TEST

s/ Debbie Causseaux
Debbie Causseaux
Acting Clerk, Supreme Court